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VERSUS Florida
*** CAPITAL CASE -- No date of execution set ***

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3	Jul 19 1984		Brief of respondent Florida in opposition filed.
4	Jul 26 1984		DISTRIBUTED. September 24, 1984
5	Aug 20 1984	X	Reply brief of petitioner Robert D. Heiney filed.
7	Oct 1 1984		REDISTRIBUTED. October 5, 1984
9	Oct 9 1984		REDISTRIBUTED. October 12, 1984
11	Oct 15 1984		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justi Brennan joins. (Detached opinion.)

BEST AVAILABLE COPY

PETITION FOR WRIT OF CERTIORARI

NO. 83-6994

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JUN 22 1984
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ROBERT D. HEINEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

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QUESTION I

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Heiney v. State, 447 So.2d 210 (Fla.1984), is set forth in Appendix A. The motion for rehearing is set forth in Appendix B, and the denial thereof is Appendix C.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered February 2, 1984, and petitioner's timely motion for rehearing was denied on April 19, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes, and involves the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was found guilty, after a jury trial, of first degree murder and robbery with a deadly weapon. After the penalty phase of the trial, the jury returned a verdict recommending that petitioner be sentenced to life imprisonment without possibility of parole for twenty-five years. Notwithstanding the jury's recommendation, the trial court, on March 29, 1979, sentenced petitioner to death. In his sentencing order, the trial court expressed the following reason for his rejection of the jury's life recommendation:

> While acknowledging the recommendation of the trial jury, the Court, as required by the Statutes, has carefully considered the aggravating circumstances as compared to the mitigating circumstances, and finds that there are no mitigating circumstances to offset the aggravating circumstances found to exist. The Court has no knowledge as to the deliberations of the jury in reaching its decision to recommend life imprisonment, but the Court concludes from its hearing the evidence in this case that the jurors were probably influenced in their recommendation by the absence of direct testimony bearing on the guilt of the Defendant. If the Court should allow this reasoning to influence the sentence which the Statutes dictate should be rendered, it would have the effect of making the sentence harsher for a person confessing his involvement in a capital offense.

[App. E 4-5]

On February 2, 1984, the Supreme Court of Florida affirmed petitioner's conviction and death sentence. Petitioner's timely motion for rehearing was denied on April 19, 1984.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his brief on appeal, petitioner contended that the provision of the Florida death penalty statute which authorizes the trial court to override a jury's recommendation of life imprisonment and to impose a death sentence in its stead is violative of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution [App. F 2]. Petitioner further contended that the trial court's rejection of the jury's life recommendation in this case was improper under the standards established in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), in that there was a reasonable basis for the jury's life verdict [App. F 3-15, G 3-7]. Specifically, petitioner argued that, in refusing to consider the relative weakness of the circumstantial evidence of guilt as a possible mitigating circumstance, and in refusing to give effect to the jury's life recommendation which (as the court recognized) was probably based on the jurors' concern that the circumstantial evidence did not conclusively foreclose the possibility of petitioner's innocence, the trial court violated the constitutional principles set forth in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) [App. F 12-15, G 6-7]. Finally, petitioner argued that "the contorted rationale expressed in the trial judge's sentencing order" [App. F 15] (i.e. that neither he nor jury could properly consider, in determining whether the death penalty should be imposed, the relative weakness of the circumstantial evidence of guilt, because this would be unfair to defendants who confess) had the effect of punishing him for exercising his constitutional right to remain silent [App. F 15, see App. F 13-14].

The Florida Supreme Court affirmed petitioner's conviction and death sentence, holding that the trial court's override of the jury's life recommendation comported with the requirements of Tedder v. State, supra [App. A 6-7]. The opinion makes no mention of the reasons expressed in the trial court's sentencing order for his rejection of the jury's life recommendation. Petitioner's argument that the relative weakness of the evidence of guilt may properly be considered as a basis for a sentence less than death was also ignored in the opinion. In light of the result, petitioner assumes that this argument was rejected sub silentio.

REASONS FOR GRANTING WRIT

QUESTIONS PRESENTED

QUESTION I

TO THE EXTENT THAT IT AUTHORIZES THE TRIAL JUDGE TO OVERRIDE A JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSE A DEATH SENTENCE IN ITS STEAD, FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT CONTAINED IN THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The question of the constitutionality of the "life override" provision of Florida's death penalty statute is presently before this Court in Spaziano v. Florida, __U.S.__ (1984) (case no. 83-5596)(34 Cr.L. 4139). Petitioner respectfully requests that this Court accept this case for review in conjunction with Spaziano or, in the alternative, stay its disposition of this petition for certiorari until Spaziano has been decided.

The Supreme Court of Florida, relying on this Court's approval of Florida's death penalty statute in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) has rejected constitutional challenges to the trial court's statutory authority to override a jury's life recommendation. See e.g., Douglas v. State, 373 So.2d 895 (Fla.1979); Johnson v. State, 393 So.2d 1069 (Fla.1980); Porter v. State, 429 So.2d 293 (Fla.1983); Routly v. State, __So.2d__ (Fla.1983)(case no.

60,066, opinion filed September 22, 1983). It is petitioner's position that the assumption which underlies all of the decisions upholding the constitutionality of the override procedure -- i.e. that the override is designed as a safeguard against unreasoned imposition of the death penalty -- has proven to be faulty. The override option, in practice, is not a safeguard but a gauntlet; a "fall-back" opportunity for the state to persuade the judge to impose the death penalty, in the event that it fails to persuade the jury. For this reason, petitioner submits that the trial court's authority to override a jury's life recommendation is, as applied, violative of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

In Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) the defendant contended that application of Florida's post-Furman death penalty statute in his case violated the prohibition against ex post facto laws, since the crimes of which he was convicted occurred before the enactment of the statute. He claimed, inter alia, that at the time the offenses were committed, the trial court was without authority to override the jury's recommendation of mercy, while under the new statute a life recommendation could be (and in his case, was) overridden. This Court held that the ex post facto clause was inapplicable, characterizing the changes in the law as procedural and "on the whole ameliorative". Dobbert v. Florida, supra, 432 U.S. at 292. Referring to the Tedder standard,[1] the Court said:

> This crucial protection demonstrates that the new statute affords significantly more safeguards to the defendant than did the old. Death is not automatic, absent a jury recommendation of mercy, as it was under the old procedure. A jury recommendation of life may be overridden by the trial judge only under the exacting standards of Tedder. Hence, defendants are not significantly disadvantaged vis-a-vis

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[1] In Tedder v. State, 322 So.2d 908, 910 (Fla.1975), the Florida Supreme Court held that "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

> the recommendation of life by the jury on the other hand, unlike the old statute, a jury determination of death is not binding. Under the new statute defendants have a second chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court. No such protection was afforded by the old statute.
>
> Dobbert v. Florida, supra, 432 U.S. at 293-94.

In State v. Dixon, 283 So.2d 1 (Fla.1973), the case in which the state Supreme Court upheld the constitutionality of Florida's death penalty statute, it said:

> It is necessary at the outset to bear in mind that all defendants who will face the issue of life imprisonment or death will already have been found guilty of a most serious crime, one which the Legislature has chosen to classify as capital. After his adjudication, this defendant is nevertheless provided with five steps between conviction and imposition of the death penalty -- each step providing concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient.

Specifically addressing the third of these safeguards, the trial court's authority to reject the jury's recommendation, the Florida Supreme Court said:

> To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.
>
> State v. Dixon, supra, at 8.

In Thompson v. State, 328 So.2d 1 (Fla.1976), the Florida Supreme Court wrote:

> This court is well aware that the recommendation of sentence by the jury is only advisory and is not binding on the trial court. However, the advisory opinion of the jury must be given serious consideration, or there would be no reason for the legislature to have placed such a requirement in the statute. It stands to reason that the trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprisonment.

Even before the Furman decision, the possibility of a two-step jury determination of guilt and punishment in capital cases was suggested by Chief Justice Ervin of the Florida Supreme Court, concurring in Perkins v. State, 228 So.2d 382, 384 (Fla. 1969). Chief Justice Ervin further suggested:

> Possibly a jury's decision to recommend or not to recommend mercy in a capital case should not be held to preclude the trial judge from determining in his sound discretion the punishment to be imposed upon the defendant in a capital case, provided the defendant timely requests an allocutionary hearing and a final determination by the trial judge of the sentence to be imposed. If such a hearing is requested the jury's nonrecommendation of mercy could be deemed as advisory only. The allocutionary hearing could be held by the trial court as a part of the jury's determination concerning a recommendation, or afterwards, in the discretion of the trial judge.

The only states other than Florida which permit a trial judge to impose a sentence of death notwithstanding the jury's recommendation of life are Indiana and Alabama. See Judy v. State, 416 N.E.2d 95 (Ind. 1981); Brewer v. State, 417 N.E.2d 889, 898 (Ind. 1981); Ruth v. State, 431 So.2d 555, 559 (Ala. Cr. App. 1982). [Each of these cases refers to the override procedure in their respective statutes, but none of them is a "life override" case. As far as petitioner has been able to determine, neither the Indiana nor Alabama appellate courts have yet had occasion to decide a case in which a trial court overrode a jury's life recommendation and imposed a death sentence. In contrast, the Florida Supreme Court has decided 59 such cases and many more are pending]. The Indiana Supreme Court first had occasion to review a death sentence imposed under its present statute in Judy v. State, supra at 106, and stated:

> Our review of these various constitutional and statutory requirements and our rules satisfies us that our sentencing scheme passes constitutional muster. Under our procedure, the sentencing authority's discretion, as exercised by the jury and the trial court, "is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt v. Florida, supra, 428 U.S. at 258, 96 S.Ct. at 2969, 49 L.Ed.2d at 926. Significantly, in cases tried to a

> jury, the trial court may not simply rely solely on the jury's advice; rather, he must conduct this analysis independent of the evaluation and recommendation made by the jury. In this fashion, the trial court, as the actual sentencing authority, provides an additional safeguard against a death penalty recommendation which may have been prompted by improper factors. Of course, the trial court must analyze the case in the same independent manner if it is tried only to him.

The fact that Florida trial courts, in practice, make liberal use of the override option to impose a death sentence despite a life recommendation is instantly revealed by a glance at Walsh v. State, 418 So.2d 1000, 1003-04 (Fla.1982). In its July 29, 1982 opinion in Walsh, the Court listed 8 cases in which it had affirmed a death sentence imposed after a life recommendation override, and 23 cases in which it had reversed a death sentence imposed after a life recommendation override, with directions to impose a life sentence. Walsh itself falls into the latter category. Nine "life override" cases decided up to that point were not listed in Walsh.[2] Sixteen "life override" cases have been decided since Walsh.[3] Two decisions involved co-defendants who were both sentenced to death after

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2 Taylor v. State, 294 So.2d 648 (Fla.1974) (death sentence reversed); Gardner v. State, 313 So.2d 675 (Fla.1975) (death sentence affirmed); Sawyer v. State, 313 So.2d 680 (Fla.1975) (death sentence affirmed); McCrae v. State, 395 So.2d 1145 (Fla.1980) (death sentence affirmed); Jacobs v. State, 396 So.2d 713 (Fla.1981) (death sentence reversed); Lewis v. State, 398 So.2d 432 (Fla.1981) (remanded for resentencing); Miller v. State, 415 So.2d 1262 (Fla.1982) (death sentence affirmed); McCray v. State, 416 So.2d 804 (Fla.1982) (death sentence reversed); and Silvia v. State, 418 So.2d 996 (Fla.1982) (death sentenced reversed).

3 Stevens v. State, 419 So.2d 1058 (Fla.1982) (death sentence affirmed); Schlender v. State, 422 So.2d 833 (Fla.1982) (death sentence affirmed); McCampbell v. State, 421 So.2d 1072 (Fla.1982) (death sentence reversed); Porter v. State, 429 So.2d 293 (Fla.1983) (death sentence affirmed); Harris v. State, 429 So.2d 696 (Fla.1983) (death sentence reversed); Kennedy v. State, 427 So.2d 723 (Fla.1983) (death sentence reversed); Webb v. State, 433 So.2d 496 (Fla.1983) (death sentence reversed); Washington v. State, 432 So.2d 44 (Fla.1983) (death sentence reversed); Tafero v. State, 433 So.2d 508 (Fla.1983) (death sentence affirmed); Hawkins v. State, 436 So.2d 44 (Fla.1983) (death sentence reversed); Richardson v. State, 437 So.2d 1091 (Fla.1983) (death sentence reversed); Engle v. State, 438 So.2d 803 (Fla.1983) (remanded but life override approved); Herzog v. State, 439 So.2d 1372 (Fla.1983)(death sentence reversed); Routly v. State, 440 So.2d 1257 (Fla.1983)(death sentence affirmed); Lusk v. State, 446 So.2d 1038 (Fla.1984)(death sentence affirmed); Delap v. State, 447 So.2d 210 (Fla.1984)(death sentence affirmed).

each received a life recommendation.[4] Altogether, the Florida Supreme Court has reviewed 30 death sentences imposed under the present statute after a jury recommended life. Treating Engle v. State as an affirmance and Lewis v. State as a reversal, there have been 21 occasions in which the Court has affirmed a death sentence following the trial court's override of the jury's life recommendation.

In stark contrast, the occasions in which a trial judge has utilized the "safeguard" of the override procedure to reject a jury recommendation of death -- the original and primary justification for the availability of the override option -- are few and far between. It is not possible to say exactly how rare a creature is the "death recommendation override" for the reason pointed out by Justice England, dissenting as to penalty in Alvord v. State, 322 So.2d 533, 542 n.2 (Fla.1975):

> Since we do not have jurisdiction to review capital cases resulting in a sentence of life imprisonment (absent some other basis for our jurisdiction), we have no idea how many persons convicted of capital crimes have avoided a judge's sentence of death. Nor do we know what the juries recommended in those cases.

The routine use of the override to nullify jury life recommendations as opposed to its primary intended purpose as a safeguard against unreasonable death recommendations is indicative of a serious malfunction in the operation of the Florida death penalty statute. Either the state of Florida has a severe problem with unreasonably lenient jurors (a possibility which petitioner submits is remote, especially in light of the fact that death penalty juries do not include those citizens of the state who would never impose the death penalty regardless of the circumstances)[5] or else there is a clear pattern of abuse

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4 Barclay v. State, 343 So.2d 1266 (Fla.1977) (Barclay and Dragon, death sentences affirmed); McCaskill v. State, 344 So.2d 1276 (Fla.1977) (McCaskill and Williams, death sentences reversed). Barclay subsequently was granted a new appeal (which is pending) based on ineffective assistance of counsel. Barclay v. Wainwright, 444 So.2d 956 (Fla.1984).

5 See e.g. Witt v. State, 342 So.2d 497, 499 (Fla.1977); Lemon v. State, 398 So.2d 798, 799-01 (Fla.1980), upholding the practice of "death-qualifying" jurors in capital cases.

of the override option on the part of trial judges. The Florida Supreme Court's review under the Tedder standard does not cure the problem. As the Fifth Circuit Court of Appeals observed in Spinkellink v. Wainwright, 578 F.2d 582, 608 (5th Cir. 1978), "reasonable persons can differ over the fate of every criminal defendant in every death penalty case." If a death sentence following a jury recommendation of life can be sustained only where no reasonable person would differ, does this mean that Justices McDonald and Overton were unreasonable to dissent in Stevens v. State, supra; Miller v. State, supra; Johnson v. State, supra; and Lusk v. State, supra? Was Justice England unreasonable to dissent in Boy v. State, 293 So.2d 690 (Fla.1977), and was Governor Graham unreasonable to grant clemency in Boy's case? Was Justice Boyd unreasonable to dissent as to one of the co-defendants in Barclay v. State, 343 So.2d 1266 (Fla.1977)?

The impossibility of proper review under the Tedder standard as presently applied is further demonstrated by the fact that a Florida jury makes no express findings in support of its recommendation of life or death. Thus, while the result on appeal of a life recommendation override turns on whether the jury's recommendation was "reasonable" or "unreasonable", the absence of specific findings makes it impossible for the reviewing court even to know what the basis for the jury's recommendations was. As a result, the parties and the appellate court must speculate about the reason for the recommendation [see Silvia v. State, supra, (Boyd, J. dissenting from reduction of sentence)] before reaching a conclusion as to its validity. When applied in this manner, the Tedder standard is simply too amorphous to pass constitutional muster.

The trial court's override power has proven not to be a safeguard against unreasonable jury recommendations of death. Assuming arguendo that the state has a valid interest in ensuring against "unreasonable" recommendations of life, that interest is already more than adequately protected by the state's ability to weed out prospective jurors who adamantly oppose the death penalty, and by the fact that a Florida pen-

alty jury's recommendation need not be unanimous (thus preventing one or two or even five "unreasonable" jurors from blocking a reasonable death recommendation). Only in the event that six to all twelve members of the jury, all of whom have stated under oath that they will follow the law and can impose the death penalty under appropriate circumstances, conclude that under the circumstances of the particular case the death penalty is not appropriate, is a life recommendation returned.

In determining whether a penal sanction comports with the Eighth Amendment ban against cruel and unusual punishment, assessment of contemporary values is required. Trop v. Dulles, 356 U.S. 86, 100-01, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958); Gregg v. Georgia, 428 U.S. 153, 173, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The critical function performed by capital sentencing juries in assessing Eighth Amendment values was aptly described in Witherspoon v. Illinois, 391 U.S. 510, 519-20 and n.15, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968):

> [A] jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express the conscience of the community on the ultimate question of life or death.
>
> * * *
>
> And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that marks the progress of a maturing society.'

A jury's life recommendation reflects the determination that, in the individual case before it, imposition of the death penalty does not accord with contemporary values. Only three states, Florida, Indiana, and Alabama, have death penalty statutes which permit a jury's recommendation of life to be nullified. Only in Florida does it appear that jury life recommendations are commonly, perhaps even routinely, ignored. [See Burch v. Louisiana, 441 U.S. 130,138 (1979), recognizing that the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not"]. Florida's override procedure has been approved by the Flor'da

Supreme Court and by this Court on the assumption that it serves as a safeguard against unreasoned jury death verdicts. It is becoming more and more apparent that the override does not serve this function, and that in fact it operates in many cases, as in the present case, to deprive a capital defendant of an entirely reasonable life verdict. For this reason, the constitutionality of a trial judge's authority to override a jury's life recommendation can no longer be upheld.

QUESTION II

UNDER THE CIRCUMSTANCES OF THIS CASE, WHERE THE JURY'S LIFE RECOMMENDATION WAS APPARENTLY BASED ON THEIR BELIEF THAT THE EVIDENCE DID NOT CONCLUSIVELY FORECLOSE THE POSSIBILITY OF INNOCENCE, THE IMPOSITION OF A DEATH SENTENCE NOTWITHSTANDING THE JURY'S RECOMMENDATION VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The trial court in this case concluded (correctly, petitioner believes) that the jury's recommendation of life imprisonment must have been based on "the absence of direct testimony bearing on the guilt of the Defendant" [App. E 4]. Under Florida case law, the trial court may not override a life recommendation unless the facts justifying a death sentence are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); See Provence v. State, 337 So.2d 783, 787 (Fla.1976); Welty v. State, 402 So.2d 1159, 1164 (Fla.1981); Malloy v. State, 419 So.2d 1080, 1083 (Fla.1982). Where there is any reasonable basis for the jury's life recommendation, the trial court is not free to substitute his own judgment to override it. See Shue v. State, 366 So.2d 387, 390 (Fla.1978); Malloy v. State, 382 So.2d 1190, 1193 (Fla.1979); Odom v. State, 403 So.2d 936, 942 (Fla.1981); Malloy v. State, supra. If the jury's life recommendation may have been premised on a valid mitigating circumstance, whether statutory or non-statutory, then there is a reasonable basis for the recommendation and it cannot be overridden. See e.g. Welty v. State, supra, at 1164; Gilvin v. State, 418 So.2d 996, 999 (Fla.1982). In the instant case, instead of treating the jury's concern as to the relative weakness

of the circumstantial evidence of guilt as a mitigating circumstance or as a reasonable basis for its life recommendation, the trial court turned this factor against petitioner. Using Alice in Wonderland logic, the trial court reasoned that, if the jury's residual doubt as to guilt were allowed to influence the decision whether to impose the death penalty or a life sentence, this would be unfair to defendants who confess. Amazingly, the trial court's view is supported by Florida case authority which appears to hold, as a matter of law, that doubt as to guilt (i.e. genuine doubt, but not necessarily rising to the level of reasonable doubt needed to preclude conviction, see Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981)), or the jury's degree of confidence in the quantity or quality of the evidence of guilt, cannot be considered by the jury as a mitigating factor and cannot provide a reasonable basis for a life recommendation. In Buford v. State, 403 So.2d 943 (1981), the Florida Supreme Court affirmed a death sentence imposed following a jury life recommendation, and rejected a defense argument that the life verdict may have been based on the weakness of the evidence or residual doubt as to guilt:

> A convicted defendant cannot be a "little bit guilty." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.
>
> Buford v. State, supra, at 953.

It is petitioner's position that Florida's death penalty statute, if so construed as to deny him the opportunity to seek a meaningful[6] life recommendation from the jury by maintaining his innocence and by urging the jury to consider whether the

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[6] Using the obvious, affording a capital defendant the opportunity to seek a life sentence by maintaining his innocence and asking the jury to consider the nature and quantity of the evidence of guilt is meaningless if those considerations are to be characterized as "unreasonable", since even if he is successful, the recommendation is subject to being overridden and replaced with a death sentence. For this reason, the death sentence imposed in this case cannot constitutionally be upheld unless the jury's concern that the evidence might not foreclose all genuine doubt as to guilt is in fact an unreasonable and irrelevant consideration in deciding whether to impose the death penalty. And it is not. Smith v. Balkcom, supra; Model Penal Code, Section 201.6(1)(f), infra.

evidence is conclusive enough to justify the extreme and irrevocable penalty of death, such a construction of the statute places it in violation of the Eighth and Fourteenth Amendments. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); People v. District Court of State, 590 P.2d 31 (Colo. 1979); Smith v. Balkcom, supra.

A jury's decision to recommend life over death when it harbors some lingering doubt as to guilt is an inherently reasonable one. Start with the fact that virtually all post-Furman[7] death penalty statutes are based on the approach taken in the Model Penal Code as adopted by the 1962 Annual Meeting of the American Law Institute. (See Proffitt v. Florida, 428 U.S. 242, 249-49, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), noting that Florida's death penalty statute is patterned in large part on the Model Penal Code; see also Gregg v. Georgia, 428 U.S. 153, 199-61, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Jurek v. Texas, 428 U.S. 262, 270-71, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Straight v. Wainwright, 422 So.2d 827 (Fla.1982)]. Model Penal Code §210.6 provides for a separate penalty proceeding before the trial court and jury, during which various aggravating and mitigating circumstances (most of which are identical or very similar to those enumerated in the Florida statute) may be established and are weighed to determine whether a life sentence or a death sentence is appropriate. However, under certain circumstances, no penalty phase is conducted at all; the trial judge simply imposes a sentence of life imprisonment if one or more of the considerations listed in §201.6(1) are met:

> (1) Death Sentence Excluded. When a defendant is found guilty of murder, the court shall impose sentence for a felony of the first degree if it is satisfied that:
>
> (a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or
>
> (b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or
>
> (c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or
>
> (d) the defendant was under 18 years of age at the time of the commission of the crime; or
>
> (e) the defendant's physical or mental condition calls for leniency; or
>
> (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

In the 1980 Revised Comments to Model Penal Code §201.6 (at p. 134), this provision was explained in the following terms:

> Finally, Subsection (1)(f) excludes the death sentence where the evidence of guilt, although sufficient to sustain the verdict, "does not foreclose all doubt respecting the defendant's guilt." This provision is an accomodation to the irrevocability of the capital sanction. Where doubt of guilt remains the opportunity to reverse a conviction on the basis of new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal.

See Lockett v. Ohio, supra, 438 U.S. at 605 ("The non-availability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence").

It needs to be made absolutely clear at this point that appellant is not arguing that Florida or any other state is constitutionally compelled to adopt or apply the Model Penal Code in its entirety. Rather, appellant's position is simply that the Model Penal Code provision conclusively demonstrates that some residual, but genuine, doubt as to guilt, and the nature or quantity of the evidence of guilt, can reasonably be treated as relevant considerations to the issue of penalty. [See also Smith v. Balkcom, 660 F.2d 573, 580-81 (5th Cir. 1981)]. Indeed, the framers of the Model Penal Code considered these matters to be so critically relevant to the issue of penalty

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[7] Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

that a death sentence should be precluded, notwithstanding the hypothetical existence of a dozen aggravating circumstances, where the evidence does not foreclose all doubt of guilt. Consequently, it cannot be said that a jury's life recommendation, based on the ground that the evidence does not foreclose all doubt of guilt, is "unreasonable".

Since, as the Model Penal Code provision illustrates, the strength or weakness of the evidence of guilt is a consideration reasonably relevant to the question of mitigation of punishment, it is clear that a capital defendant must be allowed to submit to the jury, as non-statutory mitigation under Lockett, 1) that, while recognizing that he has been found guilty of the capital offense, he maintains his innocence, and 2) that the evidence is not of such a conclusive character as to foreclose the possibility of his innocence. He may attempt to persuade the jury that based on these considerations he should receive a life sentence rather than the irrevocable penalty of death. In the event that the jury agrees, and returns a life recommendation based on these non-statutory mitigating considerations, that life recommendation must be given effect. Otherwise, the Florida death penalty statute is unconstitutional under the principles set forth in Lockett v. Ohio. See People v. District Court of State, 586 P.2d 31 (Colo. 1978), in which the Colorado Supreme Court held that state's death penalty statute unconstitutional under Lockett, in that it restricted consideration of mitigating circumstances to those enumerated in the statute. Rejecting the state's suggestion that it construe the subsection setting forth statutory mitigating circumstances as allowing for presentation and consideration of non-statutory mitigation as well, the court noted several impediments to such a construction:

> First, subsection (5) only allows the jury to consider whether the enumerated factors were in existence 'at the time of the offense.' Nothing in the numerous United States Supreme Court decisions cited above supports such a limitation. See Commonwealth v. Moody, 476 Pa. 223, 382 A.2d 442, 449-50, n. 19 (1977).
>
> Second, factors (5)(b) through (5)(e) are all in the nature of affirmative defenses. Thus, if the offender maintains his innocence,

> he is precluded from offering any mitigating circumstances at all, except that he is under the age of eighteen.
>
> People v. District Court of State, supra, at 35.

In Straight v. Wainwright, 422 So.2d 827 (Fla.1982) the Florida Supreme Court implicitly recognized that a convicted capital defendant and his attorney, as a matter of principle or as a matter of strategy, may maintain his innocence and forego presentation of other mitigating circumstances. Straight's attorney "viewed evidence of mitigating circumstances as fundamentally damaging to the integrity of his client's case"; for this reason, the attorney's alleged failure to investigate for the purpose of developing evidence of mitigating circumstances did not constitute ineffective assistance. Appellant submits that the decision in Straight makes sense only if the defendant is allowed to maintain his innocence before the jury, to argue that the evidence is not conclusive enough to warrant the death penalty, and to receive the benefit of the jury's life recommendation if he is successful in obtaining it. Otherwise, Straight simply affords the defendant, as the price for maintaining his innocence and preserving the integrity of his case, a free pass to the electric chair.

The most compelling reason why a jury's life recommendation, returned on the basis that the evidence does not foreclose all doubt of guilt, is reasonable and must be given effect is the simple undeniable fact that an innocent person can be convicted. As Justice Marshall, concurring in Furman v. Georgia, supra, 408 U.S. at 366-68, observed:

> Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our "beyond a reasonable doubt" burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death.
>
> * * *
>
> No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging

> how many innocent persons have been executed but we can be certain that there were some.

The foregoing was written by Justice Marshall in support of his position (which he and Justice Brennan have maintained in Furman and all cases thereafter) that the death penalty is unconstitutional per se. However, even assuming arguendo that the death penalty can constitutionally be imposed under certain circumstances, it is clear that where six or more penalty jurors believe that the evidence is not of such a nature as to conclusively eliminate the possibility of innocence, and recommend a life sentence for that reason, their concern is reasonable. If the trial judge overrides a life recommendation which was based on the jury's residual, but genuine, doubt as to guilt, he does so in violation of the Tedder standard and in violation of the constitutional protection against cruel and unusual punishment. If this Court were to conclude otherwise, the overwhelming irony would be that a convicted capital defendant who is in fact innocent would be in a far worse position to argue for his life than the many guilty capital defendants. Should he perjure himself and say "I was drunk when I did it", "I was crazy when I did it", when he knows that in truth he didn't do it at all? If it is recognized that it is possible for an innocent man to be convicted (and see Tibbs v. State, 337 So.2d 788, 791 (Fla. 1976) and Tibbs v. State, 397 So.2d 1120 (Fla.1981)), then a defendant must be afforded a meaningful opportunity to maintain his innocence before the penalty jury. This is not to say that a defendant who maintains his innocence is automatically entitled to a life sentence rather than a death sentence. This is to say that if he is successful in convincing the jury that there is enough possibility of his innocence that he should receive life imprisonment rather than the death penalty, that life recommendation cannot constitutionally be nullified by a trial judge and an appellate court who are operating on the simplistic notion that a defendant cannot be "a little bit guilty" (Buford v. State, supra, at 953).

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be granted.

Respectfully submitted,

MICHAEL E ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Steven L Bolotin

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, Northeast, Washington, DC 20543; Mr. Robert D. Heiney, #067877, Florida State Prison, Post Office Box 747, Starke, Florida 32091; and by hand delivery to the Honorable Sid White, Clerk of the Supreme Clerk, State of Florida, Tallahassee, Florida 32301 and to Lawrence Kaden, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 on this 18th day of June, 1984.

Steven L Bolotin
STEVEN L. BOLOTIN

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ROBERT D. HEINEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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EDITOR'S NOTE

PAGES 20 thru E-5 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Robert D. HEINEY, Appellant,

v.

STATE of Florida, Appellee.

No. 54718.

Supreme Court of Florida.

Feb. 8, 1984.

Rehearing Denied April 10, 1984.

Defendant was convicted before the Circuit Court, Okaloosa County, Clyde B. Wells, J., of first-degree murder and robbery with a deadly weapon and sentenced to death. He appealed. The Supreme Court held that: (1) evidence was sufficient to support convictions, (2) collateral crimes evidence was admissible, (3) inadvertent sight, if any, by jurors of defendant in shackles outside courtroom was not so prejudicial as to require mistrial, (4) conviction for robbery under indictment charging premeditated and felony-murder did not violate double jeopardy, (5) record supported finding of aggravating circumstances that murder was heinous, atrocious, or cruel, and (6) sentence of death was not too great a punishment.

Affirmed.

Boyd, J., dissented with an opinion in which McDonald, J., concurred.

McDonald, J., dissented with an opinion as to conviction and concurred with an opinion as to sentence.

1. Criminal Law ⇐1410(1), 1158.6

Question of whether evidence fails to exclude all reasonable hypotheses of innocence is for jury to determine, and where there is substantial, competent evidence to support jury verdict, Supreme Court will not reverse a judgment based upon jury verdict.

2. Homicide ⇐333(1)
Robbery ⇐24.1(1)

Evidence, although circumstantial, was sufficient to support defendant's convictions of first-degree murder and robbery with a deadly weapon, testimony of defendant's former cohabitants that defendant shot one of them in abdomen in course of argument and, upon learning of victim's critical condition and that authorities wanted to talk to defendant, asked another cohabitant to drive him out of town was relevant to show motive for subsequent crimes and to establish "entire context" of crimes charged and therefore admissible.

3. Criminal Law ⇐369.2(1), 371(12)

In prosecution for first-degree murder and robbery with a deadly weapon, testimony of defendant's former cohabitants that defendant shot one of them in abdomen in course of argument and, upon learning of victim's critical condition and that authorities wanted to talk to defendant, asked another cohabitant to drive him out of town was relevant to show motive for subsequent crimes and to establish "entire context" of crimes charged and therefore admissible.

4. Criminal Law ⇐369.2(1), 371(12)

Test for admissibility of evidence of collateral crimes is relevance.

5. Criminal Law ⇐1169.1(12)

Error, if any, in admitting in prosecution for first-degree murder and robbery with a deadly weapon testimony relating to defendant's life style and his relationship with former girl friend was harmless.

6. Jury ⇐149

Jurors' inadvertent sight, if any, of defendant in shackles outside courtroom was not so prejudicial as to require mistrial.

7. Judges ⇐51(3)

Motion for recusal, which was not in writing, was not accompanied by two or more affidavits setting forth facts relied upon to show basis for disqualification, and was not accompanied by counsel's certificate that motion was made in good faith, was legally insufficient. West's F.S.A. RCrP Rule 3.230.

8. Criminal Law ⇐1166.11

In light of entire record, denial of defendant's motion for recusal of trial judge on basis of alleged remarks made by him during pretrial hearing was not reversible error. West's F.S.A. RCrP Rule 3.230.

9. Homicide ⇐332

Premeditation may be established by circumstantial evidence.

18. Homicide ⇐333
Evidence from which premeditation may be inferred includes manner in which homicide was committed and nature of manner of wounds.

1. Criminal Law ⇐1208(1)
Defendant's conviction, for robbery under indictment charging both premeditated and felony-murder did not violate double jeopardy where there was sufficient evidence of premeditation for jury to convict defendant of murder independently of convicting him of robbery. U.S.C.A. Const. Amends. 5, 14.

12. Homicide ⇐334
Record supported finding of aggravating circumstance that bludgeoning murder of victim with claw hammer was heinous, atrocious, or cruel.

13. Homicide ⇐334
Sentence of death was not too great a punishment for defendant's bludgeoning robbery victim to death with claw hammer.

Michael E. Allen, Public Defender, and Richard M. Corin, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith, Atty. Gen., Miguel A. Olivella, Jr., and Lawrence A. Kaden, Asst. Attys. Gen., Tallahassee, for appellee.

PER CURIAM.

Robert Heiney appeals his convictions for first-degree murder and robbery with a deadly weapon and his sentence of death. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution. Having reviewed the record and considered the issues presented by Heiney, we find no reversible error and affirm his convictions and sentences.

On June 4, 1978, Heiney was residing in Houston, Texas, with Lawanna Wickline, Terry Philips, and David Benson. On that date, after fighting with his girl friend, Lawanna Wickline, Heiney shot Terry Philips in the abdomen. Wickline called the police. Upon learning that Philips was in critical condition and that the police had been notified of the shooting, Heiney requested Benson to give him a ride out of town. Benson drove him to near the Texas state line. Heiney told Benson he was broke and that he planned to hitchhike to Florida. Benson gave Heiney $4.

Heiney was next seen in Jackson, Mississippi, at approximately 4 p.m. on June 5, 1978, in the company of the victim, Francis M. May, Jr. They went to the victim's mother's house where they remained for a brief period of time. They left with Heiney driving the victim's car. The victim's mother and his wife later positively identified Heiney as having been with the victim the day prior to his death. They both testified at trial.

On June 6, 1978, the victim's body was found a quarter of a mile south of the I-10 entrance on highway 189 near Holt, Florida. His head had been savagely beaten. A claw hammer was found just west of the body. The victim's wounds were consistent with a beating with the claw hammer. The medical examiner testified that the death was recent, probably occurring somewhere between 5 and 7 a.m., June 6. There were at least seven blows to the head and perhaps nine. There were also defensive wounds on the back side of the victim's hands and wrists. At the time of his death, the victim had a blood alcohol content of .20 percent. He died as a result of brain injury due to severe blows delivered to both sides of his skull. The victim's pant pocket had been turned inside out, and he had no identification on him.

On June 8, 1978, the investigating officer gave information on the victim's vehicle to the National Crime Information Center in Washington.

In the meantime, Heiney was driving back and forth across the country using the victim's credit card to buy gasoline, food, and lodging. On June 10, 1978, still driving the victim's car, he went to the Nevada National Bank in Reno, Nevada, and attempted to get a $75 cash advance by using the victim's Mastercharge card. When the teller at the bank began checking for approval of this advance, Heiney left, leaving the credit card behind. The teller followed Heiney and got the license tag number from the car he was driving and reported it.

Then on June 26, 1978, an Ohio state trooper saw Heiney driving the victim's car on the interstate in Ohio. He arrested Heiney for unauthorized use of an automobile (auto theft) and impounded the car. When Heiney was arrested, he had in his possession the victim's personal property including a ring the victim's wife had given him when they were married. Sheriff's deputies from Okaloosa County went to Ohio and, pursuant to a search warrant, searched the car. They found the victim's checkbook in the car's glove compartment, another credit card belonging to the victim, other papers belonging to the victim, and bloodstains matching the victim's blood type in the car. The victim's wallet was found inside Heiney's suitcase which was in the trunk of the car.

Mastercharge slips made on the victim's credit card signed after the victim's death came in from all over the country. A handwriting expert testified that the signatures on some of the credit card receipts from June 6 to June 26 could be positively identified as being forged by Heiney.

Heiney was tried and convicted of murder in the first degree and robbery with a deadly weapon. At the close of the state's case, he moved for judgment of acquittal as to both counts of the indictment. He contended that the circumstantial evidence introduced was insufficient to support verdicts of guilty for either of the crimes charged. The trial court denied the motion and submitted the case to the jury. This issue was raised again in a motion for new trial, which the trial court also denied.

During the penalty phase of the trial, the jury recommended that a life sentence be imposed. The trial court, finding three aggravating and no mitigating circumstances, imposed the death penalty.

Heiney initially challenges his convictions on the basis that the trial court erred in denying his motions for judgment of acquittal and for new trial. He argues that the circumstantial evidence was not legally sufficient to support the jury verdicts in that the evidence does not exclude the hypothesis of innocence that someone else killed the victim and that Heiney lawfully gained possession of the victim's property prior to his death.

(1, 2) When a case is based on circumstantial evidence, a special standard of sufficiency of the evidence applies. *Jaramillo v. State*, 417 So.2d 257 (Fla.1982). This standard is: "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." *McArthur v. State*, 351 So.2d 972, 976 n. 12 (Fla.1977); *Jaramillo v. State*; *McArthur v. Nourse*, 369 So.2d 578 (Fla.1979). The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse a judgment based upon a verdict returned by the jury. *Rose v. State*, 425 So.2d 521 (Fla.1982), *cert. denied*, — U.S. —, 103 S.Ct. 1002, 74 L.Ed.2d 512 (1983). In the present case, we find the evidence supports the jury's verdict that Heiney was guilty of first-degree murder and robbery. The victim was with Heiney just before he was murdered. His pant pocket where he normally carried his wallet was turned inside out. His wallet, as well as his personal belongings and his car were in Heiney's possession at the time of Heiney's arrest. Blood of the victim's blood type was found on the front seat covering and on a portion of the rear seat cover. The victim's body was completely stripped of everything of value, and Heiney was found in possession of everything of value which the victim had with him. We hold that the trial court properly denied Heiney's motions for judgment of acquittal and for new trial.

Heiney next argues that he was deprived of a fair trial when the court allowed the state to present the testimony of Lawanna

Wicklow, Terry Phillips, and David Bowden who testified that Heiney argued with Wicklow, argued with Phillips and subsequently shot Phillips in the abdomen with a .22 calibre pistol and that Heiney, upon hearing of Phillips' critical condition and that the authorities wanted to talk to him, asked Bowden to drive him out of town and to give him money since he was broke. Bowden also testified that Heiney told him he was going to hitchhike to Florida.

Heiney contends that the conduct shown by the testimony was unrelated to the crimes he was accused of committing and that this evidence tends to prove only propensity and bad character. The state responds that the evidence of the shooting in Texas was relevant to show motive for the subsequent crimes and to provide the "native context of the crimes charged."

(3, 4) We agree with the state that this testimony was properly allowed into evidence. The test for admissibility of evidence of collateral crimes is relevancy. In *Ruffin v. State*, 397 So.2d 277 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981), we described this test of relevancy and said:

> In *Williams v. State*, [110 So.2d 654 (Fla.1959)], we announced a broad rule of admissibility based upon relevancy. Necessity has never been established by this Court as an essential requisite to admissibility. In *Williams*, we declared that any fact relevant to prove a fact in issue is admissible into evidence even though it points to a separate crime unless the admissibility is precluded by a specific rule of exclusion. We further held that evidence of collateral offenses is inadmissible if the sole relevancy is to establish bad character or propensity of the accused. We emphasized that the question of relevancy of this type of evidence should be cautiously scrutinized before it is determined to be admissible, but that nonetheless relevancy is the test. Evidence of other crimes is relevant if it casts light on the character of the crime for which the accused is being prosecuted. For example, this evidence is relevant when it shows either motive, intent, absence of mistake, common scheme or plan, identity, or a system or general pattern of criminality. Subsequently, in *Williams v. State*, 117 So.2d 473 (Fla.1960), we reaffirmed the rule of admissibility enunciated in our first *Williams* case but reversed a defendant's conviction because the State had made a collateral offense a feature instead of an incident of the trial. Thereafter, in *Wilson v. State*, 230 So.2d 437 (Fla.1970), we held that the introduction of six hundred pages of trial transcript relating to separate crimes committed by the defendant was not reversible error because this evidence was relevant to establish a pattern of conduct similar to the conduct for which defendant was being prosecuted.

> In *Ashley v. State*, 265 So.2d 685 (Fla. 1972), defendant sought reversal of a murder conviction because the trial court admitted evidence of four other murders that he had committed shortly after the murder for which he was tried. We held that the evidence objected to was admissible because it was relevant to the issues of motive, intent, identity, and modus operandi of defendant. We reached this conclusion even though this evidence may not have been necessary to the State's case since Ashley's confession was in evidence as was the testimony of an eyewitness to the murder. We emphasized, "So long as evidence of other crimes is relevant for any purpose the fact that it is prejudicial does not make it inadmissible. All evidence that points to a defendant's commission of a crime is prejudicial. The true test is relevancy." 265 So.2d at 694. *See also Antone v. State*, 382 So.2d 1205 (Fla.1980); *Brown v. State*, 381 So.2d 690 (Fla.1980); *Alford v. State*, 307 So.2d 433 (Fla.1975).

> In our recent decision of *Smith v. State*, 365 So.2d 704 (Fla.1978), relying upon *Ashley v. State*, we recited that among the other purposes for which a collateral crime may be admitted under *Williams* is establishment of the entire context out of which the criminal action occurred.

397 So.2d at 279-80. (Footnote omitted.)

Applying this test, we find that the collateral crime evidence was relevant and admissible. It was relevant to show motive for the subsequent crimes and to establish the "native context" of the crimes charged. This evidence is relevant to show that Heiney's desire to avoid apprehension for the shooting in Texas motivated him to commit robbery and murder in Florida so that he could obtain money and a car in order to continue his flight from Texas. He had no transportation, no money, and was running from a possible murder. He was desperate. Because this evidence is clearly relevant and admissible, Heiney's contention that the introduction constitutes reversible error is without merit.

(5) A closer question is presented by testimony relating to Heiney's lifestyle and his relationship with Lawanna Wicklow. Any error which may have occurred in admitting this particular testimony, however, was harmless beyond a reasonable doubt.

(6) Heiney also argues that the trial court erred in not denying the motion for mistrial which was based on his allegation that some of the jurors may have seen him in chains on two occasions while he was being transported to and from the courtroom. The record was asked by the court whether he wanted to question the jury as to whether they had seen Heiney in shackles outside the courtroom, and he responded in the negative. The trial court denied Heiney's motion and stated that if any of the jurors ever saw Heiney, it was only for a fleeting moment in the corridor. We rejected a similar contention in *Heiney v. State*, 354 So.2d 881 (Fla.1980), wherein defendant on appeal argued that he was prejudiced because some jurors inadvertently saw him being brought to the courtroom in handcuffs. We recognized the holding in *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), that an individual accused of a crime cannot be forced over his objection to stand trial in prison garb, but we held: "The appellant, however, was not forced to stand trial in prison clothes or in handcuffs, and we find that the inadvertent sight of the appellant in handcuffs was not so prejudicial that it required a mistrial." 354 So.2d at 885. We likewise find that in the present case the inadvertent sight of Heiney, if in fact he was seen by some of the jurors, was not so prejudicial as to require a mistrial.

We find no merit to Heiney's contention that the trial court reversibly erred in denying his oral motion to recuse the judge on the basis of alleged remarks made by him during a pretrial hearing. Heiney alleged that the trial judge had threatened Heiney in such a manner as to cause him to believe the judge was prejudiced against him. This pretrial hearing was reported, but no such prejudicial comments appear in the record. Heiney suggests that these comments were "off the record."

Florida Rule of Criminal Procedure 3.230 clearly sets out the procedure which a party must follow when seeking to disqualify a judge assigned to try the case on the grounds that the judge is prejudiced against the movant. This rule provides:

> (a) Every motion to disqualify shall be in writing and be accompanied by two or more affidavits setting forth facts relied upon to show the grounds for disqualification, and a certificate of counsel of record that the motion is made in good faith.
>
> (b) A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time.

(7, 8) Heiney's motion was not in writing and was not accompanied by two or more affidavits setting forth the facts relied upon to show a basis for disqualification, nor did his counsel file a certificate that the motion was made in good faith. It was therefore legally insufficient. Moreover, reviewing the denial of this oral motion for disqualification in light of the entire record, we find no reversible error.

We have considered Heiney's challenge to two of the jury instructions in the context of all the jury instructions given and in light of the record before us and conclude that they do not amount to reversible error.

[9-11] Although Heiney was indicted for premeditated and felony murder, he argues that it is likely that the jury based its verdict on the felony murder rationale. Therefore, relying on *State v. Pinder*, 375 So.2d 836 (Fla.1979), he contends his conviction for robbery should be reversed on the basis that to convict him of both crimes would violate the double jeopardy clause of the United States Constitution as applied to the states through the fourteenth amendment. *Pinder* was recalled from in *State v. Hegstrom*, 401 So.2d 1343 (Fla.1981), in light of the later United States Supreme Court decisions of *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), and *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). In *Hegstrom*, we held that where a defendant is convicted of felony murder, he may be sentenced but not sentenced for the underlying felony. If there is sufficient evidence to support a finding by the jury of premeditated murder, however, this previously stated principle announced in *Hegstrom* does not apply. *McCampbell v. State*, 421 So.2d 1072 (Fla. 1982); *Brookins v. State*, 418 So.2d [illegible] (Fla.), cert. denied, — U.S. —, 103 S.Ct. 104, 74 L.Ed.2d 149 (1982). In the present case, Heiney was charged with premeditated murder and felony murder. There is sufficient evidence of premeditation. There were at least seven blows to the victim's head inflicted by a claw hammer. The medical examiner testified that any three of the wounds would have been sufficient to render the victim unconscious. Three blows would have been sufficient for Heiney to effect his objective of robbery. If this had been his only objective. But he continued to beat the victim on both sides of his head until his brain was pulped, his ear was lacerated and only hanging on by a fragment, his skull was severely fractured, and his eye was completely exploded. Premeditation may be established by circumstantial evidence. Evidence from which premeditation may be inferred include the manner in which the homicide was committed and the nature and manner of the wounds. *McKinney v. State*, 400 So.2d 500 (Fla.1981); *Welty v. State*, 402 So.2d 1159 (Fla.1981). Thus, because the jury need not have convicted Heiney of robbery in order to support the murder conviction, we affirm the conviction and sentence for robbery.

In addition to reviewing the record in light of the errors asserted by Heiney, we have reviewed the evidence pursuant to Florida Rule of Appellate Procedure 9.140(f), and we conclude that no new trial is required. Accordingly, we affirm his conviction.

Heiney also challenges his sentence of death imposed by the trial court after the jury had recommended that a life sentence be imposed.

As aggravating circumstances, the trial court found that Heiney was under sentence of imprisonment, that the murder was committed while Heiney was engaged in the commission of a robbery, and that the murder was heinous, atrocious, or cruel. The court found that there were no mitigating factors to overcome the aggravating factors.

We have previously rejected the argument now being made by Heiney that for the judge to reject a jury's recommendation of life constitutes double jeopardy. *Phippen v. State*, 389 So.2d 991 (Fla.1980); *Douglas v. State*, 373 So.2d 895 (Fla.1979).

We have also previously rejected the argument that being on parole is not equivalent to being "under sentence of imprisonment." *Martin v. State*, 420 So.2d 583 (Fla.1982), cert. denied, — U.S. —, 103 S.Ct. 1488, 75 L.Ed.2d 927 (1983); *McCampbell v. State*, [illegible]

[12] We find no merit in Heiney's assertion that the trial court erred in finding the aggravating circumstance that the kidnapping murder of the victim in this case was heinous, atrocious, or cruel. The record amply supports this finding. Seven severe hammer blows were inflicted on the victim's head. The medical examiner testified that the injuries to the victim's hands were probably defense wounds caused by the victim's holding his hands up to try to protect himself. *See Adams v. State*, 341 So.2d 765 (Fla.1976), cert. denied, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 158 (1977).

We also find no merit to Heiney's assertion that the trial judge considered the Texas shooting of Phillips by Heiney as a nonstatutory aggravating factor. The trial judge expressly stated that he did not consider this as an aggravating circumstance. Here there are three valid aggravating factors and no mitigating factors. We can conclude on the basis of the record before us that, even if we were to find that the court improperly considered this nonstatutory aggravating factor, elimination of this factor from the weighing process could not possibly affect the trial court's decision to impose the sentence of death.

[13] We hold that the trial court properly found three aggravating and no mitigating factors. Reviewing this case in light of other cases in which the death sentence has been imposed, we conclude that the sentence of death in this case is not too great a punishment. Applying the test announced in *Tedder v. State*, 322 So.2d 908 (Fla.1975), we also conclude that the facts in this case suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ.

Accordingly, finding no reversible error, we affirm the convictions and sentences.

It is so ordered.

CONVICTION: ALDERMAN, C.J., and ADKINS, OVERTON and EHRLICH, JJ., concur.

BOYD, J., dissents with an opinion with which McDONALD, J., concurs.

McDONALD, J., dissents with an opinion.

SENTENCE: ALDERMAN, C.J., and ADKINS, OVERTON and EHRLICH, JJ., concur.

McDONALD, J., concurs with an opinion.

BOYD, J., dissents with an opinion with which McDONALD, J., concurs.

BOYD, Justice, dissenting.

I must dissent to the majority opinion. It was error to allow the presentation of evidence showing that appellant used to beat his girlfriend regularly and had lived on her earnings as a prostitute. It was also error to admit evidence that appellant shot a man in Texas four days prior to the murder of which he was accused in the present case. Evidence of these matters was irrelevant because it had *no* logical bearing on any of the material issues of the case. Even giving the state the maximum benefit of any slight doubt (of which there is actually none) on the issue of relevancy, I would still find the evidence inadmissible on the ground that its improper prejudicial impact far outweighed any arguable probative value it may have had on a material issue. When a court allows the admission of irrelevant evidence of serious unrelated criminal behavior on the part of the accused, tending to depict him as a person of bad character or having a propensity to commit crimes, such evidence must be presumed to have had impact on the jury to the detriment and improper prejudice of the accused. *Straight v. State*, 397 So.2d 903, 908 (Fla.) cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). I therefore conclude that appellant's conviction should be reversed and the case remanded for a new trial.

Any evidence that is relevant to some issue of material fact, unless barred by some specific rule of exclusion, is usually admissible. McCormick, *Evidence* § 184 (2d ed. 1972); 1 *Wharton's Criminal Evidence* § 151 (13th ed. 1972). Relevancy is that quality of evidence that gives it some logical bearing upon—and some probative value in deciding—an issue of material fact. McCormick, *Evidence* § 185 (2d ed. 1972). Evidence that is not relevant is inadmissible and should be excluded upon timely objection.

One species of irrelevant evidence that has given rise to much judicial concern is evidence of criminal conduct or activity of a

criminal nature other than that which is charged in the indictment or information. Evidence of crimes and wrongful acts of the accused that are separate and independent from the crime charged and which have no connection therewith is, like other irrelevant evidence, inadmissible. *Winstead v. State*, 91 So.2d 809 (Fla.1956); *Wallace v. State*, 41 Fla. 547, 26 So. 713 (1899). Such evidence of collateral crime on the part of the accused may "prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty." *Nichols v. State*, 90 Fla. 659, 685, 106 So. 479, 488 (1925).

Of course, it may well be that the evidence which shows some criminal conduct other than that for which the accused is on trial is also relevant to an issue of material fact. If so, then the evidence is admissible even though it points to the commission of a separate crime. *Ashley v. State*, 265 So.2d 685 (Fla.1972); *State v. Norris*, 168 So.2d 541 (Fla.1964); *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). The judicial concern referred to above, however, is that the collateral crime evidence will serve only to show criminal propensity or bad character with resulting improper prejudice to the accused. Therefore Florida law seeks to assure the relevancy of such evidence by requiring that it fit into one of several judicially recognized evidentiary categories, such as motive, intent, opportunity, common scheme or plan, identity, absence of mistake, or the like. *See, e.g., Dean v. State*, 277 So.2d 13 (Fla. 1973); *Hawkins v. State*, 206 So.2d 5 (Fla. 1968); *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). The list of categories is not absolute or all-inclusive since its purpose is to help courts determine whether the evidence has some logical bearing on a factual issue.

The state argues and the majority finds that the events in Texas were part of the *res gestae* of the crime and were admissible to show the "entire context" of the criminal episode, as that concept was used in *Ruffin v. State*, 397 So.2d 277 (Fla.), *cert. denied*, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981), and *Smith v. State*, 365 So.2d 704 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). Both cases are distinguishable. *Smith* was a first-degree murder case, and the collateral crime there was also a murder. The collateral murder occurred on the same night as the murder charged. The victim of the collateral murder had been one of the perpetrators of the murder charged. He was killed when the murderers argued over the initial victim's property. Evidence of the collateral murder placed the accused at the scene of the crime charged and placed him in a car linked to the scene of the crime charged. The later murder shed light on the motive for the earlier murder. In view of all these factors, the Court could conclude that the two crimes were linked by an "unbroken chain of circumstances" and that the collateral crime evidence was "relevant to illustrate the criminal context in which the first murder occurred." *Id.* at 707. *Ruffin* is similarly distinguishable. *Smith* and *Ruffin* do not stand for the proposition that any matter in chronological proximity to the crime charged is relevant and admissible. To be part of the "entire context," evidence must be linked to the issues by logical relationship. *Ashley v. State*, 265 So.2d 685 (Fla.1972); *Sawyer v. State*, 95 Fla. 42, 115 So. 819 (1928).

In the present case, there was no logical connection between the shooting and other events in Texas and the crimes of which appellant was accused. Unlike *Smith*, here the victims of the collateral crimes were not involved with the crimes charged. The collateral crimes did not occur at the same time or place, or involve the same group of people as the crimes charged. Therefore the evidence pertaining to the criminal events in Texas were not admissible as part of the "entire context" of the crimes for which appellant was on trial.

The state argues and the majority finds that the evidence of the shooting in Texas was relevant to show appellant's motive for committing the murder in Florida: to acquire money, credit cards, and a car as means to escape apprehension. The state relies on *State v. Statewright*, 300 So.2d 674 (Fla.1974). There the Court held that evidence that the defendant had committed a homosexual act five years before the crime charged was relevant to show a motive for the murder. The theory of the prosecution was that the defendant killed the victim to prevent him from revealing the earlier homosexual relationship. Therefore the prior act was held to be relevant to the question of the motive for the killing. In a number of cases, evidence of prior criminality has been held relevant to the question of motive for the murder of a police officer. *See, e.g., Johnson v. State*, 130 So.2d 599 (Fla.1961); *MacKenzie v. State*, 114 So.2d 684 (Fla.1959), *cert. denied*, 362 U.S. 965, 80 S.Ct. 883, 4 L.Ed.2d 879 (1960); *McVeigh v. State*, 73 So.2d 694 (Fla.), *appeal dismissed*, 349 U.S. 885, 75 S.Ct. 210, 99 L.Ed. 696 (1954). In these cases, evidence of the prior crime was relevant to show the reason for the defendant's wish to avoid encountering the police officer and being apprehended. The present case is distinguishable as far as motive is concerned. Here there was no evidence that the victim knew about the shooting in Texas, nor was he in a position of authority to arrest appellant on suspicion of [illegible]

I therefore conclude that the testimony about the shooting incident in Texas, appellant's other violent acts there, and his relationship with his girlfriend were not relevant to any material issue of fact in his trial for the murder and robbery of Francis [illegible] in Florida. The admission of the evidence over defense counsel's objection was error. Since the only function the evidence could have served was to indicate that appellant was of bad character and had a propensity to commit crime, I would find that the error was prejudicial and deprived appellant of a fair trial.

Even assuming that appellant's prior criminal conduct was relevant in this case, I do not believe it should have been admitted because any probative value it may have had was far outweighed by its prejudicial impact. Even when evidence of collateral criminal conduct has some relevancy to a material fact in issue, it is error to allow an improper prejudicial effect to outweigh the limited probative value of the evidence. *Smith v. State*, 365 So.2d 704, 708 (Fla.1978) (Sundberg, J., dissenting), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); *Williams v. State*, 117 So.2d 473 (Fla.1960). This is merely an application of the general rule that where improper prejudice outweighs probative value, even relevant evidence should be excluded. § 90.403, Fla.Stat. (1979); 1 *Wharton's Criminal Evidence* § 151 (13th ed. 1972).

In this case the prosecution relied heavily upon the prejudicial impact of the testimony about appellant's beating his girlfriend and living on the money she earned as a prostitute. It relied even more heavily on the evidence of his shooting another person in Texas and fleeing from that state. The prosecution emphasized these crimes in its closing arguments to the jury. Since the relevancy of these crimes to appellant's motive for committing the murder is purely speculative, and the prejudicial impact extremely great, the evidence should not have been admitted.

I note that the apparent facts of the robbery and murder are such that the capital felony of murder could be deemed to warrant the death penalty. However, because appellant did not receive a fair trial on the question of his guilt or innocence, the question of the appropriate penalty is purely a hypothetical one, upon which I need not express an opinion.

I dissent to the affirmance of appellant's conviction and would order a new trial.

McDONALD, J., [illegible]

McDONALD, Justice, dissenting in part, concurring in part.

I dissent for the sole reason that it was prejudicial error to allow into evidence testimony surrounding the Texas shooting of

Phillips and of Heiney's relationship with Wicklins. I see no relevance in this testimony at all, and it was clearly prejudicial. The majority opinion is grasping at suppositions to make the testimony relevant. If relevant, this relevance is so minute that it must yield to the prejudice caused by this evidence. I would grant a new trial. On all other issues, including the imposition of the death penalty, I concur.

Leslie POSTER, Petitioner,

v.

STATE of Florida, Respondent.

No. 60190.

Supreme Court of Florida.

March 15, 1984.

Defendant was convicted in the Circuit Court, Highlands County, Clifton M. Kelly, J., of sale of marijuana and possession of more than five grams of marijuana, and he appealed. The District Court of Appeal, 392 So.2d 314, affirmed. On petition for review of the decision on ground it expressly and directly conflicted with the decision of another District Court of Appeal, the Supreme Court, Adkins, J., held that where information in count one charged only sale of marijuana, and count two alleged defendant possessed more than five grams of marijuana, defendant was properly convicted and sentenced on both counts, since possession was not charged in count one, and thus count two was not a lesser-included offense.

Decision approved.

1. Criminal Law ⇐1111, 199

If two statutory offenses have the exact, same essential constituent elements, or when one statutory offense includes all the elements of the other, the two offenses are constitutionally the "same offense" and a person cannot be put in jeopardy as to both such offenses unless the two offenses are based on separate and distinct factual events.

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law ⇐199

If an offense is a lesser-included offense of a greater offense also charged, double jeopardy clause proscribes multiple convictions and sentences for both the greater and lesser-included offenses. U.S.C.A. Const.Amend. 5.

3. Criminal Law ⇐29, 99(3)

Where information in count one charged only sale of marijuana, and count two alleged only that defendant possessed more than five grams of marijuana, defendant was properly convicted and sentenced on both counts, since possession was not charged in count one, and thus count two was not a lesser-included offense. West's F.S.A. § 775.021(4).

Jerry Hill, Public Defender and Geoffrey A. Foster, Asst. Public Defender, Tenth Judicial Circuit, Bartow, for petitioner.

Jim Smith, Atty. Gen., and Michael A. Palecki and Theda James Davis, Asst. Attys. Gen., Tampa, for respondent.

ADKINS, Justice.

This cause is before the Court on petition for review of a decision of the district court of appeal on the ground that it expressly and directly conflicts with a decision of another district court of appeal. The decision below, *Porter v. State*, 392 So.2d 314 (Fla. 2d DCA 1980), conflicts with *Williams v. State*, 377 So.2d 750 (Fla. 1st DCA 1979), cert. denied, 388 So.2d 742 (Fla. 1980). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. *Williams* has been disapproved. *Smith v. State*, 430 So.2d 443 (Fla.1983).

IN THE SUPREME COURT OF FLORIDA

ROBERT D. HEINEY, :

Appellant, :

v. : CASE NO. 56,779

STATE OF FLORIDA, :

Appellee. :

MOTION FOR REHEARING

Appellant, ROBERT D. HEINEY, pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure, hereby moves this Court for rehearing in the above-styled case, and as grounds therefor states:

1. Appellant contended on appeal that he was deprived of a fair trial by the state's introduction of evidence of an uncharged crime; specifically, the introduction of testimony that appellant shot and critically wounded Terry Phillips in Houston, Texas. Appellant further argued that his right to a fair trial was abridged by the state's introduction of irrelevant and highly prejudicial evidence concerning his relationship with Lawanna Wicklins. This testimony gratuitously informed the jury that appellant lived with Wicklins, a long-time prostitute whom he'd met in a bar; that Wicklins would give appellant money, and pay for their food and lodging, with the profits she brought in from "hooking", and she would spend the rest on drugs; that appellant beat her on the night he later shot Terry Phillips, and that this was not the first time he'd beaten her. Appellant argued that this testimony served no purpose other than to demonstrate his bad character and to prejudice him in the eyes of the jury.

In its opinion issued February 2, 1984, this Court, by a 4-3 vote, rejected appellant's argument and affirmed his conviction. The Court also affirmed appellant's death sentence which was imposed notwithstanding the jury's recommendation of life. The majority concluded that the evidence of the uncharged shooting incident was relevant to show motive for, and to establish the

"entire content" of, the crimes charged. Appellant would respectfully urge this Court to reconsider its decision on this point for the reasons stated in Justice Boyd's dissenting opinion. However, it is the majority's conclusion with regard to the evidence of appellant's bad character, revolving around his relationship with Lawanna Wickline, that is the focus of this motion for rehearing. The majority stated that "a closer question" is presented by the testimony relating to appellant's lifestyle and his relationship with Wickline, but disposed of the issue by concluding that "[a]ny error which may have occurred in admitting this particular testimony . . . was harmless." Appellant believes that, in reaching this conclusion, the Court misapplied the "harmless error" doctrine.

2. It is a well recognized principle of law that the state is not permitted to introduce evidence attacking the character of the accused, unless and until he has first placed his good character in issue before the jury. See e.g. Young v. State, 143 Fla. 261, 195 S. 869 (1940); Albright v. State, 378 So.2d 1234 (Fla. 2d DCA 1979); Layton v. State, 368 So.2d 1363 (Fla. 1st DCA 1977); Bell v. State, 334 So.2d 146 (Fla. 2d DCA 1976); Carter v. State, 332 So.2d 120 (Fla. 2d DCA 1976); Barbera v. State, 272 So.2d 870 (Fla. 4th DCA 1973); Andrews v. State, 172 So.2d 505 (Fla. 1st DCA 1965). In the present case, appellant did not testify and his character was never placed in issue -- the only question was whether the circumstantial evidence, which primarily consisted of the fact that appellant was in the company of the victim the day before his death, and the fact that appellant was in possession of the victim's car, wallet, and personal belongings at the time of his arrest, convinced the jury beyond a reasonable doubt that appellant was guilty of first degree murder. There was no direct evidence that appellant committed the murder. In Straight v. State, 397 So.2d 903, 908 (Fla. 1981), this Court said:

> It is improper for a jury to base a verdict of guilt on the conclusion that because the defendant is of bad character or has a propensity to commit crime, he therefore probably committed the crime charged. See, e.g.,

> Winstead v. State, 91 So.2d 609 (Fla. 1956); Nichols v. State, 90 Fla. 659, 106 So. 479 (1925). Therefore, evidence of criminal activity not charged is inadmissible if its sole purpose is to show bad character or propensity to crime. But evidence of criminal activity not charged is admissible if relevant to an issue of material fact. Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 103, 4 L.Ed.2d 88 (1959). If irrelevant, its admission is presumed harmful error because of the danger that a jury will infer the bad character or propensity to crime that demonstrated as evidence of guilt of the crime charged.

In the present case, the state chose to introduce at trial, over strenuous and repeated objection by defense counsel, the details of appellant's lifestyle and his relationship with Lawanna Wickline; a lifestyle which an Okaloosa County jury could reasonably be expected to regard as sordid and despicable. The state emphasized this highly prejudicial evidence of bad character in its closing argument to the jury, " . . . then we had Lawanna "Pixie" Wickline, the prostitute from Columbus that was in Houston, giving her money to the Defendant in this case, money from prostitution" (R.1342). In its brief on appeal, the state did not suggest even the remotest possible relevance of this testimony to the crimes charged, and appellant submits that it would have taxed even the most creative mind to come up with an arguably valid justification for introducing it. The majority opinion of this Court does not espouse that there was any relevant purpose for the introduction of this testimony, much less one which might outweigh its prejudicial impact. Even assuming arguendo that the deliberate placement before the jury of such flagrantly prejudicial "character evidence" could ever be harmless error, that could not be the case unless the evidence of guilt was "overwhelming". See e.g. Malaver v. State, 413 So.2d 827 (Fla. 3d DCA 1982)(evidence, which included confessions by defendant to two different individuals, was overwhelming); Hamilton v. State, 366 So.2d 30 (Fla. 3d DCA 1978)(overwhelming eyewitness testimony identifying defendant as perpetrator of robbery); Gordon v. State, 288 So.2d 285 (Fla. 4th DCA 1974)(three eyewitnesses identified

defendant as shooter of victim and police officer testified to her spontaneous admission; evidence was overwhelming); compare Wilt v. State, 410 So.2d 924 (Fla. 3d DCA 1982)(admission of evidence improperly attacking defendant's character deprived him of a fair trial, and was reversible error where evidence could not be characterized as overwhelming). In the present case, even assuming arguendo that this Court was correct in holding that the circumstantial evidence was legally sufficient to overcome appellant's motion for judgment of acquittal, it was a far cry from amounting to the "overwhelming evidence" necessary to properly invoke the harmless error doctrine. Contrast Chapman v. California, 386 U.S. 18, 25-26 (1967)(although the state presented a "reasonably strong 'circumstantial web of evidence'" against defendants, evidence was not so overwhelming as to permit application of harmless error rule) with Harrington v. California, 395 U.S. 250, 254 (1969)(distinguishing Chapman and noting that the case against Harrington "was not woven from circumstantial evidence"; evidence, which included defendant's inculpatory statements, admissible testimony of a co-defendant, and testimony of several eyewitnesses, was overwhelming and error was harmless). In Palmes v. State, 397 So.2d 648, 653 (Fla. 1981), this Court recognized that in a capital case it must carefully scrutinize any error before determining it to be harmless. Appellant submits that this Court cannot be certain that the jury's consensus, which it should not have had, that appellant lived with and lived off the earnings of a drug-using prostitute whom he beat up on more than one occasion did not affect its verdict. See Coler v. State, 418 So.2d 238, 239 (Fla. 1982). Presumably the prosecutor thought this testimony might affect the jury's verdict; otherwise why would he risk reversal to drag it in? The admission of this sordid, irrelevant, and outrageously prejudicial "character evidence" served only to portray appellant as a low-life in the eyes of the jury. Instead of only circumstantial evidence, it gave the state circumstantial evidence plus a defendant whom the jury would naturally dislike and believe to be capable of committing such a crime. Either alone, or in conjunction with the evidence of the Texas shooting incident, the introduction of

this evidence before the jury deprived appellant of a fair trial (see Wilt v. State, supra; Paul v. State, 340 So.2d 1249 (Fla. 3d DCA 1976); Pennsylvania v. Wainwright, 650 F.2d 337 (5th Cir. 1981)), and cannot be written off as harmless.

WHEREFORE, appellant respectfully requests that this Court grant rehearing, reverse his convictions and death sentence, and remand this case for a new trial.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Lawrence Kaden, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 and a copy mailed to appellant, Robert D. Delsey, #067877, Florida State Prison, Post Office Box 747, Starke, Florida 32091 on this 17th day of February, 1984.

STEVEN L. BOLOTIN

IN THE SUPREME COURT OF FLORIDA

THURSDAY, APRIL 19, 1984

ROBERT D. HEINEY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 56,778

Circuit Court Case No. 78-593 Division "A" (Okaloosa)

On consideration of the motion for rehearing filed by attorney for appellant.

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, OVERTON and EHRLICH, JJ., Concur
BOYD and McDONALD, JJ., Dissent

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PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By Debbie Carmichael
Deputy Clerk

cc: Hon. Newman C. Brackin, Clerk
Hon. Clyde B. Wells, Judge

Steven L. Bolotin, Esquire
Miguel A. Olivella, Jr., Esquire
Lawrence A. Kaden, Esquire

APPENDIX C

C-1

(b) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding a sentence of imprisonment:

1. The defendant's criminal conduct neither caused nor threatened serious harm.

2. The defendant did not know and had no reason to know that his criminal conduct would cause or threaten serious harm.

3. The defendant acted under a strong provocation.

4. There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense.

5. The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that the victim sustained.

6. The defendant had no history of prior delinquency or criminal activity or had led a law-abiding life for a substantial period of time before the commission of the present crime.

7. The defendant's criminal conduct was the result of circumstances unlikely to recur.

8. The character and attitudes of the defendant indicate that he is unlikely to commit another crime.

9. The defendant is particularly likely to respond affirmatively to nonstructial treatment.

(3)(a) A court shall sentence a defendant to pay a fine unless it finds that the defendant is unable or will be unable to pay the fine and the imposition of a fine will not prevent the defendant from being rehabilitated or from making restitution to the victim of his crime.

(b) A court shall sentence a defendant to pay a fine whenever the imposition of a fine is sufficient to punish the defendant and prevent the public.

(c) A court shall sentence a defendant to pay a fine in addition to imprisonment or probation if, in the opinion of the court, the defendant has derived a pecuniary gain from the crime or the fine is specially adapted to deterrence of the particular crime or to the treatment and rehabilitation of the offender.

[illegible] s. 3A-11, § 7, eff. Oct. 1, 1982.

Library References [illegible]
Criminal Law ⇔1208(1).
C.J.S. Criminal Law §§ 1965, 1966.

141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special jury or juries as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the

Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) *Advisory sentence by the jury.*—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) *Findings in support of sentence of death.*—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) *Review of judgment and sentence.*—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless this time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) *Aggravating circumstances.*—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) *Mitigating circumstances.*—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Amended by Laws 1972, s. 72-724, § 6, eff. Jan. 3, 1973; Laws 1974, s. 74-379, § 1, eff. Oct. 1, 1974; Laws 1977, s. 77-174, § 845, eff. Aug. 3, 1977; Laws 1977, s. 77-174, § 1, eff. Aug. 3, 1977; Laws 1979, c. 79-353, § 1, eff. July 2, 1979; Laws 1980, c. 80-313, § 17, eff. Aug. 13, 1980.

Laws 1972, s. 72-724, § 6, substantially re-wrote this section.

Laws 1974, s. 74-379, § 1, added the third sentence to subsec. (2).

Laws 1977, s. 77-104, a reviser's bill, corrected errors and deleted obsolete or expired provisions. See Reviser's Note—1977.

Laws 1977, s. 77-174, a reviser's bill, amended this section to reflect language ordinarily used by the division of statutory revision and to delete.

Laws 1979, c. 79-353, substituted in the fifth sentence of subsec. (2) "in the opinion of the court and the discretion of the defendant" for "in summary", deleted in subsec. (2) (c) and (3) (a) "as enumerated in subsection (6)", and added subsec. (2) (g).

Laws 1980, c. 80-313, was a reviser's bill to amending subsec. (3)(a). See Reviser's Note—1980.

Reviser's Note—1977.

Conforms internal references to editorial revisions of subsections enacted by s. 5, ch. 72-724, Laws of Florida.

Reviser's Note—1980.

Amended to conform to ch. 74-383, Laws of Florida, which replaced the crime of rape formerly proscribed in ch. 794 with the crime known as "sexual battery." See s. 794.011.

Cross References

Sentencing hearing for capital cases, see Crim. and Procedure Rule 3.780.

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United States Supreme Court

Aggravating circumstances, necessity of jury findings see Proffitt v. Georgia, 1976, 96 S.Ct. 2960, 428 U.S. 242, 49 L.Ed.2d 913.

Capital sentencing statutes, separate proceeding to establish sentence as constituting cruel and unusual punishment, see Bullington v. Missouri, 1981, 101 S.Ct. 1852, 451 U.S. 430, 68 L.Ed.2d 270.

Commutation of death sentence to long term sentence, see Dobbs v. Zant, 1974, 88 S.Ct. 1772, 420 U.S. 28, 48 L.Ed.2d 340.

Death penalty, application for stay of execution by mother on behalf of incompetent son, see Ford v. Bennett, 1979, 99 S.Ct. 2561, 442 U.S. 1301, 60 L.Ed.2d 1048.

Death penalty, disclosure of prosecutors notes material, see Gardner v. Florida, 1977, 97 S.Ct. 1197, 430 U.S. 349, 51 L.Ed.2d 393, n. 7.

Death penalty see Dobbert v. Florida, 1977, 97 S.Ct. 2290, 432 U.S. 282, 53 L.Ed.2d 344; Gregg v. Louisiana, 1977, 97 S.Ct. 2909, 428 U.S. 153, 49 L.Ed.2d 887.

Death penalty, exclusion of veniremen, see Davis v. Georgia, 1976, 97 S.Ct. 399, 429 U.S. 122, 50 L.Ed.2d 339.

Death penalty, mitigating factors, see Lockett v. Ohio, 1978, 98 S.Ct. 2954, 438 U.S. 586, 57 L.Ed.2d 973.

[redacted]

[redacted]

[redacted]

RULINGS OF THE FLORIDA SUPREME COURT, THE COURT HAS HEARD THIS CIR-
CUMSTANCE WITH 921.141 (5)(g) ABOVE AND IS NOT TREATED AS AN AGGRA-
VATING CIRCUMSTANCE.

3. (h) THE COURT FURTHER FINDS THAT THE CRIME WAS COMMITTED
IN AN ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL MANNER IN THAT THE
COURT HAS CONCLUDED THAT THIS DEFENDANT TOOK THE HAMMER WHICH WAS
FOUND AT THE SCENE AND INTRODUCED INTO EVIDENCE, AND BRUTALLY BEAT
THE VICTIM, A DRUNKEN MASS OF HELPLESS HUMAN FLESH, NOT JUST SUFFICIENT
TO DRAIN THE LIFE FROM HIM, BUT IN A MANNER TO DEMONSTRATE A TOTAL
DISREGARD FOR THE SANCTITY OF HUMAN LIFE.

THE COURT HAS CAREFULLY REVIEWED THOSE SEVEN MITIGATING CIR-
CUMSTANCES CONTAINED IN FLORIDA STATUTES 921.141 (6)(a-g). BASED ON
THE COURT'S CONSIDERATION OF THESE MITIGATING FACTORS, THE COURT
SPECIFICALLY FINDS AS TO EACH:

(a) THAT THE DEFENDANT DOES HAVE A SIGNIFICANT PRIOR CRIMINAL
RECORD DATING BACK TO 1965 AND THUS IS NOT ENTITLED TO CONSIDERATION
UNDER THIS CIRCUMSTANCE.

(b) THERE HAS BEEN NO EVIDENCE OR INFERENCE THAT THE DEFENDANT
WAS UNDER THE INFLUENCE OF ANY MENTAL OR EMOTIONAL DISTURBANCE, AND
THUS SHOULD RECEIVE NO CONSIDERATION UNDER THIS MITIGATING CIRCUM-
STANCE.

(c) THERE HAS BEEN NO EVIDENCE NOR INDICATION THAT THE
VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT EXCEPT TO OFFER
THE DEFENDANT AN ACCOMMODATION OF RIDE, THUS THE DEFENDANT RECEIVES NO
CONSIDERATION UNDER THIS CIRCUMSTANCE.

(d) THERE IS NO PROOF OR INFERENCE THAT THE DEFENDANT WAS
ACTING IN CONCERT WITH ANYONE, THE PROOF IS ALL TO THE EFFECT THAT
THE DEFENDANT WAS ACTING ALONE, THUS THE DEFENDANT IS ENTITLED TO
NO CONSIDERATION UNDER THIS CIRCUMSTANCE.

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(e) THERE IS NO BASIS IN THE EVIDENCE OF EITHER ANY DURESS
OR DOMINATION BY ANOTHER TO ENTITLE HIM TO ANY MITIGATION UNDER
THIS PROVISION.

(f) THERE HAS BEEN NO SHOWING THAT THE DEFENDANT HAD A
LESSENED APPRECIATION FOR THE CRIMINALITY OF HIS CONDUCT NOR THAT
HIS ABILITY TO CONFORM HIS CONDUCT WAS EVEN SLIGHTLY IMPAIRED,
THUS THE COURT REJECTS THIS SECTION FROM CONSIDERATION.

(g) THE DEFENDANT, AT THE TIME OF THIS OFFENSE, WAS 31-32
YEARS OF AGE, APPEARED TO BE SUFFICIENTLY PHYSICALLY AND MENTALLY
NORMAL FOR HIS AGE, AND THUS THE COURT FINDS HIS AGE SHOULD NOT
CONSTITUTE A MITIGATING FACTOR IN HIS FAVOR.

THE COURT HAS FOUND THAT THE AGGRAVATING CIRCUMSTANCES, AS
ENUMERATED IN 921.141 (5)(a), (g), AND (h), ARE PRESENT IN THIS
CASE AND THAT THERE ARE NO MITIGATING CIRCUMSTANCES TO OVERCOME
THE AGGRAVATING CIRCUMSTANCES FOUND PRESENT.

WHILE ACKNOWLEDGING THE RECOMMENDATION OF THE TRIAL JURY,
THE COURT, AS REQUIRED BY THE STATUTES, HAS CAREFULLY CONSIDERED
THE AGGRAVATING CIRCUMSTANCES AS COMPARED TO THE MITIGATING CIRCUM-
STANCES, AND FINDS THAT THERE ARE NO MITIGATING CIRCUMSTANCES TO
OFFSET THE AGGRAVATING CIRCUMSTANCES FOUND TO EXIST. THE COURT HAS
NO KNOWLEDGE AS TO THE DELIBERATIONS OF THE JURY IN REACHING ITS
DECISION TO RECOMMEND LIFE IMPRISONMENT, BUT THE COURT CONCLUDES
FROM ITS HEARING THE EVIDENCE IN THIS CASE THAT THEY WERE PROBABLY
INFLUENCED IN THEIR RECOMMENDATION BY THE ABSENCE OF DIRECT TESTI-
MONY BEARING ON THE GUILT OF THE DEFENDANT. IF THE COURT SHOULD
ALLOW THIS REASONING TO INFLUENCE THE SENTENCE WHICH THE STATUTES
DICTATE SHOULD BE RENDERED, IT WOULD HAVE THE EFFECT OF MAKING THE

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A SENTENCE HARSHER FOR A PERSON CONFESSING HIS INVOLVEMENT AS A CAPITAL OFFENSE. This COURT, BEING CONVINCED BEYOND EVERY REASONABLE DOUBT OF THE DEFENDANT'S GUILT AND THE AGGRAVATING CIRCUMSTANCES PRESENT, IS CONSTRAINED TO IMPOSE THE MAXIMUM PENALTY OF DEATH IN THE ELECTRIC CHAIR. ACCORDINGLY, THE COURT HEREBY ADJUDGES YOU TO BE GUILTY OF THE CRIME OF MURDER IN THE FIRST DEGREE, AND SENTENCES YOU TO DIE IN THE ELECTRIC CHAIR FOR YOUR SAID OFFENSE.

THE COURT ALSO ADJUDGES YOU TO BE GUILTY OF THE OFFENSE OF ROBBERY AND SENTENCES YOU TO A SENTENCE OF IMPRISONMENT FOR LIFE IN THE STATE PRISON OF FLORIDA, SAID SENTENCE TO RUN CONSECUTIVE TO THE DEATH SENTENCE IN THE EVENT THERE SHOULD BE ANY COMMUTATION OF THE DEATH SENTENCE BY THE FLORIDA SUPREME COURT OR THE PARDON BOARD.

[signature]
CIRCUIT JUDGE
3-29-79

STATE OF FLA VS DIXON, 283 So.2d 1
SULLIVAN VS STATE, 303 So 2d 632 (1974)
PROFFITT VS STATE, 315 So 2d 461 (1975)
JACKSON VS STATE, 359 So 2d 1190 (MARCH 9, 1978)
FOSTER VS STATE, So 2d (OPINION FILED FEB 22, 1979)

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IN THE SUPREME COURT OF FLORIDA

ROBERT D. RIGHEY,

Appellant,

v. CASE NO. 56,778

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE
FIRST JUDICIAL CIRCUIT, IN AND
FOR OKALOOSA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

MICHAEL H. MORSE
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SECOND JUDICIAL CIRCUIT
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ATTORNEY FOR APPELLANT

ISSUE VIII

THE TRIAL COURT ERRED BY REJECTING THE JURY'S SENTENCING RECOMMENDATION OF LIFE IMPRISONMENT AND BY IMPOSING THE DEATH SENTENCE UPON THE APPELLANT WHICH IMPOSITION, IF SUSTAINED AND CARRIED OUT, WILL UNCONSTITUTIONALLY DEPRIVE THE APPELLANT OF HIS LIFE.

Before specifically discussing the trial court's sentencing order and the issue of whether the death sentence imposed is proper on the facts of this case and in light of this Court's previous decisions in similar capital cases, the appellant would, as a matter of belief and preservation, note certain basic constitutional objections to the trial judge's disregard of the jury's life recommendation. The appellant asserts that when a trial judge rejects a jury recommendation of life and imposes the ultimate penalty, said action if sustained, constitutes double jeopardy, cruel and/or unusual punishment, and deprives him of his right to trial by jury and due process of law as these constitutional rights are established by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and by Sections 9, 16, 17, and 22 of Article I of the Constitution of the State of Florida. For a presentation of these issues the Court's attention is respectfully directed to the pending cases of Phippen v. State, Case No. 54,664; Porter v. State, Case No. 55,841; Johnson v. State, Case No. 54,167, and to the reported case of Douglas v. State, 303 So.2d 655 (Fla. 1970), which rejected Douglas' double jeopardy claim but which opinion also indicated that the issue was more fully developed in the pending cases of Phippen and Porter, supra.

This Court, by statute and case law, has an independent responsibility to determine whether the imposition of a death sentence is warranted. Section 921.141(4), Florida Statutes, State v. Dixon, 283 So.2d 1 (Fla. 1973), Songer v. State, 322 So.2d 481 (Fla. 1975), and Adams v. State, 341 So.2d 765 (Fla. 1976). In cases, such as the appellant's, where the jury has recommended that the trial judge impose a life sentence, this Court has established certain standards to guide in the appellate review of the death sentence. The classic statement of the proper principle to be applied appears in Tedder v. State, 322 So.2d 908 (Fla. 1975):

> . . . A jury recommendation under our triffurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts supporting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.
>
> 322 So.2d at 910

It has been judicially recognized that juries under Florida's death penalty statute have been reluctant to recommend the imposition of the death penalty in all but the most aggravated cases despite general knowledge and concern of the citizenry over the substantial increase in crime. McCampbell v. State, 344 So.2d 1278, 1280 (Fla. 1977). This Court in McCampbell noted that in reviewing the propriety of a death sentence it "... must weigh heavily the advisory opinion of the sentencing jury." 344 So.2d at 1280 (emphasis added). In Lamadline v. State, 303 So.2d 17 (Fla. 1974) it is stated that the jury's advisory opinion "... could be a critical factor in determining whether or not the death penalty should be imposed." 303 So.2d

at 39. It is quite simply that: "Juries are the conscience of our communities." McCaskill, supra at 1290. This Court has been, as it should be, reluctant to ignore this still small voice of society. The jury has the benefit of seeing and hearing a defendant in the courtroom and if all relevant data is considered by the jury their recommended sentence should not be disturbed unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation. Jones v. State, 332 So.2d 615, 619 (Fla. 1976) and Lafler v. State, 365 So.2d 149, 151 (Fla. 1978). Perhaps, Chief Justice England said it best in his concurring opinion in Thomberg v. State, 339 So.2d 204 (Fla. 1976):

> . . . Where a jury and a trial judge reach contrary conclusions because the facts derive from conflicting evidence, or where they have struck a different balance between aggravating and mitigating circumstances which both have been given an opportunity to evaluate, the jury recommendation should be followed because that body has been assigned by history and statute the responsibility to discern truth and mete out justice. Given that the imposition of a death penalty "is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment . . . ", both our Anglo-American jurisprudence and Florida's death penalty statute favor the judgment of jurors over that of jurists.
>
> 339 So.2d at 208-209 (footnote omitted)

Keeping the preceding guidelines in mind the appellant is convinced that, upon review and analysis, this Court will perceive the absolute impropriety of the death sentence in his case.

As the outset, there are some facts from the record which must be noted in order to place the jury's life recommendation

in its proper perspective. The appellant's jurors all believed in capital punishment (R-524). The appellant's jurors, over objection, were erroneously urged and instructed that they could find as aggravating circumstances, that the capital felony was committed while the appellant was engaged in the commission of a robbery and that the crime was committed for pecuniary gain (R-1322-1325; 1336; 1339-1340). See: Section 921.141(5)(d)(f), Florida Statutes and Provence v. State, 337 So.2d 783 (Fla. 1976). The appellant's jurors considered all the same facts that were considered by the trial judge (R-1337-1338; 229). Thus, notwithstanding their belief in the ultimate penalty, their being "over-instructed" on aggravating circumstances and their cognizance of all the facts available, they either failed to find beyond a reasonable doubt that one or more of the aggravating circumstances existed or found that if aggravating circumstances existed they were outweighed by the mitigating circumstances (R-1341-1342). Their conclusion was not at all unreasonable. The trial court's reasons for disregarding the jury's findings and advisory opinion, as will be seen, were in some instances legally improper and as a whole not the least bit compelling.

The trial judge's sentencing order and findings of fact is somewhat confusing when his alphabetical designations and descriptions are compared with Section 921.141, Florida Statutes (R-219-223). While it is this Court's responsibility to independently determine whether a death sentence is proper and to insure that the trial judge has been faithful to the dictates of Section 921.141, Florida Statutes, it is not the function of

this Court to call through what has been listed as aggravating and mitigating circumstances in the trial court's order and then to determine which are proper for consideration and which are not, and then impose a proper sentence. In accordance with the statute the culling process must be done by the trial court. Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978). However, in a case such as this, when the trial judge has overruled a jury recommendation for life it would seem to be the better part of judicial wisdom to review the judge's original order. The original order provides the best evidence and insight into why the judge imposed the sentence of death, notwithstanding the jury's advisory opinion, even though it be inartfully written.

Herein, the court below apparently found three statutory aggravating circumstances and no statutory mitigating circumstances (R-219-223). The court's findings on the aggravating circumstances, if proper, would fall into the following provisions of Section 921.141, Florida Statutes: (1) Section 921.141(5)(a); that the capital felony was committed by a person under sentence of imprisonment; (2) Section 921.141(5)(d); that the capital felony was committed while the defendant was engaged in a robbery and, (3) Section 921.141(5)(h), that the capital felony was especially heinous, atrocious or cruel (R-219-222). With appropriate quotation where needed, from the sentencing order, the trial court's findings will be discussed.

AGGRAVATING CIRCUMSTANCES

1. (A) That the Defendant was under a sentence of 1 - 5 years in the State of Kansas and the State of

this at the time of the commission of the crime for which he is being sentenced. This finding is based on the court records introduced from these jurisdictions, and these records not having been denied or rebutted.

Although the Defendant was not under conviction for the shooting of Terry Phillips in Houston, Texas, the Court has considered the unrebutted testimony to the effect that the shooting did, in fact, occur, but the Court does not include this as an aggravating circumstance.

(R-219-220)

The record actually shows that the appellee introduced documents to prove that in 1969 the appellant was sentenced in Ohio to a term of 1 - 20 years for forgery and that in 1974 he was sentenced in Kansas to a 1 - 5 year term for worthless checks. At the time of Mr. May's death the appellant was on parole for these offenses (R-1308-1318). If being on parole is coterminous with being under sentence of imprisonment, then the first part of the judge's above-quoted finding would be proper under Section 921.141(5)(a), Florida Statutes. The legal issue is clouded, if not unsettled. In State v. Dixon, supra, the Court, when discussing this provision, used the term "prisoner". In Alvord and Songer, supra, this part of the statute was applied to persons who at the time their capital crimes were committed were escapees. In Aldridge v. State, 351 So.2d 942 (Fla. 1977) and Thomas v. State, 374 So.2d 508 (Fla. 1979), this statutory aggravating circumstance was found where at the time the crimes were committed, the defendants were on parole. But in neither case did the court actually discuss this factor as being applicable to parolees and, in both cases, there were other valid statutory aggravating circumstances found and no mitigating

circumstances were present. In Stone v. State, ___ So.2d ___, Case No. 49,275, opinion filed November 1, 1979, this aggravating circumstance was apparently found proper where the defendant was, at the time of his crime, released from custody pursuant to a federal court order in a habeas corpus proceeding. See pages 8 and 9 of the slip opinion. To be contrasted is the case of Ford v. State, 374 So.2d 496 (Fla. 1979), where this Court rejected the trial judge's finding that Ford was under a sentence of imprisonment where it was shown that he was on probation when the capital felony was committed. Criminal statutes, if ambiguous, should be strictly construed in favor of the accused. Intellectually, a person is more like a probationer than a prisoner and by construction should be treated in a like fashion with regard to this aggravating circumstance.

From the above-quoted portion of the trial judge's sentencing order it is manifest that he considered (See: Alford v. State, 355 So.2d 108, 109 (Fla. 1977)) the evidence of the appellant's involvement in the Texas shooting incident as a non-statutory aggravating circumstance. It is equally clear that this consideration was legally improper. Provence v. State, supra, teaches that the aggravating circumstances listed in Section 921.141(5), Florida Statutes are exclusive and no other circumstances, such as mere arrests or accusations, can be considered as factors in aggravation. The trial court's error is obvious. To permitted an unauthorized aggravating factor to go into the life and death equation and most assuredly

is assisted in tipping the scales of the weighing process in favor of death. Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977). Provence, supra, alone, requires this Court to reconsider the jury's recommendation for life.

The second aggravating circumstance found by the trial court which he erroneously referred to as Section 921.141(5)(c)(R-220;222) is to the effect that the crime was, in fact, committed by the appellant while he was engaged in the crime of robbing the victim. Of course, if the evidence is legally sufficient to sustain the appellant's conviction, it will likewise support the trial judge's somewhat imprecise finding of this statutory aggravating circumstance.

Pursuant to Section 921.141(5)(h), Florida Statutes, the trial judge found the offense to be especially heinous, atrocious and cruel (R-221). It will be recalled that the victim died of extreme brain injury incident to severe blows to his skull. The pathologist noted seven wounds to the victim's head, at least three of which could have caused unconsciousness. He further stated, based on a blood alcohol level of .29 percent, that at the time of his death the victim was quite out of possession of his normal faculties, very drunk. Given these facts, the trial court's finding of this aggravating circumstance is not supported by the case law which has construed the applicable section of the death penalty statute and, as such, is improper. In Dixon, supra, with regard to this section the Court said:

. . . What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

261 So.2d at 9

Subsequently, in Halliwell v. State, 323 So.2d 557 (Fla. 1975) this Court rejected a trial judge's finding that Halliwell's crime was committed in an extremely heinous, atrocious and cruel manner. In Halliwell, the defendant grabbed a 10-inch bronze bar and beat the victim's skull with lethal blows and thereafter continued to beat, bruise and cut the victim's body after the first fatal injuries to the victim's brain. It was held that the offense was no more shocking in the annals of killing than in a majority of the murder cases reviewed by this Court. Compare: Tedder, supra, where the victim was shot from ambush, allowed to languish because of the defendant's actions, and died almost a month after the shooting. This court apparently rejected the trial judge's heinous, atrocious and cruel finding and directed the trial court to enter a life sentence in accordance with the jury's recommendation: Dupre v. State, 328 So.2d 425 (Fla. 1976), where during a robbery or burglary the victim was bruised and beaten into semi-consciousness, was bound and gagged so that efforts at freedom could have resulted in a choking death, and where, ultimately she died about a week later having never fully regained consciousness. Dupre's death sentence was reduced to life, which sentence had been recommended by his jury; Thompson v. State, 328 So.2d 1 (Fla. 1976), where

the victim caught the defendant attempting to commit a larceny at a restaurant. A fight ensued whereupon the defendant pursued the victim outside the restaurant, disarmed the victim and stabbed the victim several times. After the stabbing, the defendant fulfilled his larcenous intent. The ultimate penalty imposed by the trial court was reversed for imposition of a jury recommended life sentence: Jones v. State, 332 So.2d 615 (Fla. 1976), victim raped and bled to death after being stabbed at least 30 times. Held: trial court should have followed the jury's recommendation for a life sentence: Provence v. State, supra, victim stabbed eight times during drug transaction. Provence's judicially imposed death sentence was reversed, his jury having struck the life or death balance in his favor; Chambers v. State, supra, where the victim was beaten, bruised all over the head and legs, had a deep gash under her left ear, several internal injuries and an unrecognizable face. She died five days after the beating from cerebral and brain stem contusions. Held: after weighing the aggravating and mitigating circumstances that the jury recommendation of a life sentence was appropriate; Burch v. State, 343 So.2d 831 (Fla. 1977), defendant attempted to rape the victim, 35 to 36 puncture wounds were found on the victim's decomposed corpse. Held: no compelling reason for the trial judge's rejection of the jury's life recommendation; and, Brown v. State, 367 So.2d 616 (Fla. 1979), where the victim was kidnapped, robbed, beaten with fists and boards, shot at and ultimately held under water until he was dead. Held: citing to Tedder, supra, the more

severe penalty (death) was not so clearly directed by the sentencing evidence that it should override the considered judgment (life) of Brown's jury. The appellant is equally entitled to have his jury recommended life sentence reinstated.

MITIGATING CIRCUMSTANCES

The trial judge failed to find any of the statutory mitigating circumstances listed in Section 921.141(6), Florida Statutes (R-221-222). He then erroneously concluded that there were no mitigating circumstances to overcome the aggravating circumstances found (R-222). His conclusion is in error because he limited the possibility of mitigation to those factors enumerated in the statute and, in so doing, overlooked or failed to consider the case of Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), as it specifically applies to the facts of this case. In Lockett the court said:

> We are now faced with those questions and we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques - probation, parole, work furloughs, to name a few - and various postconviction remedies, may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.
>
> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments. (Emphasis by Court - footnotes omitted)

438 U.S. at 604-605

Lockett is on point to the facts of the appellant's case because a reading of the appellant's closing arguments clearly demonstrates that the predominant factor urged in mitigation was the weakness of the appellee's circumstantial evidence against him. The best example of the trial judge's wrongful conclusion, in this regard, is shown by his order:

> While acknowledging the recommendation of the trial jury, the Court, as required by the Statutes, has carefully considered the aggravating circumstances as compared to the mitigating circumstances, and finds that there are no mitigating circumstances to offset the aggravating circumstances found to exist. The Court has no knowledge as to the deliberations of the jury in reaching its decision to recommend life imprisonment, but the Court concludes from its hearing the evidence in this case that the jurors were probably influenced in their recommendation by the absence of direct testimony bearing on the guilt of the Defendant. If the Court should allow this reasoning to influence the actions which the Statutes

dictate should be rendered, it would have the effect of making the sentence harsher for a person confessing his involvement in a capital offense.

(R-222-223)

The reason for the trial court's rejection of the jury's recommendation is the very same reason expressed in Lockett as an independent mitigating factor - the circumstances of the offense. (Compare also: Alford v. State, 307 So.2d 433 (Fla. 1975), where this court noted: "Additionally, the evidence of defendant's guilt in these crimes was particularly strong, discounting the possibility of an 'innocent' man being sentenced to die." 307 So.2d at 445). Instead of perceiving and applying the independent mitigating factor obviously found by the jury, relating to the absence of direct testimony and evidence bearing on the appellant's guilt, the trial judge apparently punished him for the weaknesses in the State's case. The situation revealed by the above-quoted portion of the trial court's order is closely analogous to what occurred in Davis v. State, 90 So.2d 629 (Fla. 1956):

> An added circumstance which suggests to us the justice of another trial in this case has to do with the comments of the trial judge after the verdict was rendered. Preliminary to sentencing the appellant, after commenting that in his view the jury would have been justified in bringing in a verdict of murder in the first degree, the judge added, "I personally think this was a brutal killing. I personally believe that you committed the deed. You did not see fit to take the stand in your defense. Now that the trial is over I can comment on that. The jury had no means of knowing whether you admitted or denied the things that were said against you." Thereafter, the appellant filed a motion for new trial which the judge promptly denied. While these comments obviously did not influence the course of the trial, we are of the

> view that the judge's reference to the failure of the defendant to testify in his own behalf obviously contributed to the trial judge's notion that the defendant was guilty. In such a state of mind and in giving weight to the fact that the defendant did not testify, a privilege which our organic law guarantees to him without adverse implications, it appears to us that the appellant could not have received on his motion for a new trial the unclouded and untarnished judgment of an impartial mediator. On the contrary, obviously improper elements entered into the Court's consideration of the sufficiency of the evidence on motion for new trial. (Emphasis By Court)

90 So.2d at 632

Certainly the exercise of one's constitutional right to remain silent is not a legally compelling or proper reason for rejecting a jury recommendation of life. The contorted rationale expressed in the trial judge's sentencing order definitely questions the idea that he applied the type of reasoned judgment required during the sentencing process in a capital case. Instead of giving the jury's recommendation great weight the trial judge went out of his way to find a reason to disregard the jury's advisory opinion. His departure not only fails to comport with common sense, it significantly departs from the case law and our Constitutions.

The conscience of the community expressed by the jury's life recommendation should have been extolled not decried. This Court can and should cure the error before it is too late.

Appendix E

IN THE SUPREME COURT OF FLORIDA

ROBERT D. HICKS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 50,770

ON APPEAL FROM THE
FIRST JUDICIAL CIRCUIT, IN AND
FOR ESCAMBIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

MICHAEL E. ALLEN
ASSISTANT PUBLIC DEFENDER
FIRST JUDICIAL CIRCUIT
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ATTORNEY FOR APPELLANT

the judgment and sentence imposed for the underlying felony should not be set aside on the possibility that it provided the basis for the first degree murder verdict. He extensively applies relies on the "polygraph test" cases of Coleman v. State, 363 So.2d 632 (Fla. 1978) and Bonifay v. State, 0.- So.2d 0.0 (Fla. 1st DCA 1978), cert. den. 360 So.2d 751 (Fla. 1978). Coleman and Bonifay, establish that criminal convictions won't be set aside on the basis of speculation as to how a jury may have interpreted a state's witness' testimony concerning the administration of a polygraph test. However, this principle has absolutely no application to the facts and inquiry presented on this issue. Instead, the proper rule is quite the opposite.

The fact that the parties are in legitimate over what theory the jury used in finding the appellant guilty of first degree murder does not answer the question. It defines it. Furthermore, the resolution of the question does not turn on who is right, or more right, or most right. This Court is confronted with a constitutional inquiry, not a question of testimonial impropriety as appeared in Coleman and Bonifay. In cases such as this where a violation of the Double Jeopardy Clause of the FIFTH Amendment is involved, if there be any doubt regarding an overturned such doubt must be resolved in the appellant's favor. This constitutional guideline is set out in Benton v. United States, 372 U.S. 784, 23 L.Ed.2d 707, 89 S.Ct. 2056 (1969), where with reference to a question presented under the Double Jeopardy Clause of the FIFTH Amendment, the Court ruled that any doubt should be resolved in favor of the liberty of the citizen.372 U.S. at 796.

Pure evidentiary questions may be resolved under Coleman and Bonifay on the basis of "when in doubt - affirm" but under Benton constitutional questions must be resolved on the basis "when in doubt - reverse".

SUMMARY

Much of what the appellee argues in its response to this issue has been sufficiently addressed by the appellant in his initial brief. When follows

will be a short discussion of certain areas of specific disagreement between the parties. To facilitate this Court's review the appellant's response on these contentions will be subdivided.

POINTS AND CITES CONFUSED

The appellee advances its belief (the appellant has previously argued to the contrary) that there are three aggravating circumstances and no mitigating circumstances in the present case. In this factual posture and with multiple citation and selective quotations from Slater v. State, 280 So.2d 1 (Fla. 1973) the appellee asserts that death is presumed to be the proper punishment and that the jury's contrary recommendation is unreasonable (Ab-11, 14, 18, 41). Having postulated its understanding of the facts and case law the appellee concludes that the test of Tedder v. State, 322 So.2d 908 (Fla. 1975) has been satisfied (Ab-41). Not so.

Tedder requires that the jury's recommendation of life should be given great weight and that if a death sentence is imposed in the face of such a jury recommendation the facts supporting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. 322 So.2d at 910. First of all the appellant has previously claimed that the trial court did not give great weight to his jury's recommendation for life. Secondly, and perhaps more importantly, the fact that the trial court may have been able to lay its hands on some arguably applicable statutory aggravating circumstances and the fact that the court stated that there were no mitigating circumstances does not render the jury's life recommendation unreasonable. The question is whether the jury could reasonably arrive at their recommendation and not whether the trial court or even this Court would have arrived at the same result. It is reasonably obvious from reading the appellee's response on this issue that it

would like Tedder to somehow go away. It won't because it is right. This fact was recently reaffirmed in this Court's opinion in Malloy v. State, ___So.2d ___, Case Number 48,580, Opinion Filed December 20, 1979. Malloy is clear authority for the idea that a trial judge cannot reject a jury recommendation for life just because there may be one or more aggravating circumstances shown by the evidence and the presence of no statutory mitigating factors. The Tedder standard was again reaffirmed in Dixon v. State, ___So.2d___, Case Number 51,401, Opinion Filed May 15, 1980.

The appellee's quoted excerpt from Slater, (Ab-11) fails to paint the full picture of what a trial judge's responsibilities are in assessing a jury recommendation for life. A complete contextual reading of the full paragraph from which the appellee quotes in part seems to express this Court's belief that trial judges with experience in the facts of criminality would be in a position to temper the inflamed emotions of jurors to whom no capital crime might appear less than heinous. Slater v. State, 280 So.2d at 8. It is manifest that this Court was thinking in terms of every when it wrote this pre-Tedder paragraph in Slater. When the conscience of the community speaks for life the Tedder standard is to be given full force and effect and this is true even if the trial judge might be of the opinion that there are aggravating circumstances and no mitigating circumstances. The reasoning is apparent there, as here, the jury has by their recommendation either failed to find beyond a reasonable doubt that one or more aggravating circumstances existed or if they did exist that they were outweighed by the presence of mitigating circumstances.

THE TRIAL COURT'S FAILURE TO FIND MITIGATION AT SENTENCING

The appellee has misconstrued the appellant's position concerning how the trial court treated the evidence of the three statutory mitigating factors and

and reports 69-10-11). There is no question that the trial judge considered this evidence in sentencing the appellant to death. He said he did (9-110-115). The fact that the judge also said he was not including this evidence as an aggravating circumstance does not make it so. This Court must make that decision. Donaldson v. State, 287 So.2d 780 (Fla. 1973) requires an independent determination on this question by this Court. If the trial court did not exercise the evidence of the Texas shooting incident in balancing the life and death equation why did he include it in his sentence findings? To the extent that this question is answered by degrees of consideration, Donaldson makes it error. 287 So.2d at 784.

THE BALLINGER CONFESSION

As the issue of whether the trial court's finding that the offense was especially heinous, atrocious and cruel can be sustained, the appellee asserts that the appellant's reliance on Ballinger v. State, 333 So.2d 337 (Fla. 1976) is totally misplaced (Ab-19; but compare AB-56). The only way reliance by the appellant on Ballinger could be misplaced would be if Ballinger said what the appellee says it does; but it doesn't. Contrary to the appellee's unbelievable reference to Ballinger (Ab-19) the opinion in the case speaks in terms of the victim being beaten with lethal blows and a continued beating, bruising, and cutting of the victim after the first fatal injuries to the victim's brain. 333 So.2d at 341. Thus the facts of Ballinger are not in sharp contrast to the facts of this case. Indeed, for purposes of finding what is especially heinous, atrocious or cruel, Ballinger is controlling authority for the appellant's previously advanced position.

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ARGUMENT AND AUTHORITIES

The appellee describes the appellant's position - Argument argument as "nonsense" (Ab-20). See Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978) and especially the appellant's previous discussion from Lockett in his initial brief at pages 54 and 55. The appellee attempts to distinguish away the appellant's reliance on Lockett on the basis that here the State's evidence reaches the threshold point of supporting a conviction the relative strength or weakness of the case can "hardly be" considered a mitigating circumstance (Ab-20).

The appellee apparently divisions Lockett as such as it divisions Hitler, supra, for it is unwilling to accept the plain meaning of either decision. The fact that the jury was and should be influenced in their sentence recommendation by the absence of direct evidence bearing on the guilt of the defendant is the very reason for Lockett. Oddly enough even the trial judge noted this possibility in his sentencing order but unfortunately went on to hold this factor against the appellant (R-110-115).

The case of Eddings v. South Carolina, 439 U.S. 104, 49 L.Ed.2d 944, 99 S.Ct. 2954 (1979), does especially 439 U.S. at 960, directly contravenes the appellee's first-based presumptive death argument (Ab-21). Additionally, it is telling support for the fact that the court below did not give great weight to the opinion expressed by the appellant's jurors and also failed to apply reasoned judgment when it imposed the ultimate penalty upon the appellant.

As previously noted (AB-60) this Court has, at least inferentially, recognized that the prospects of sentencing an "innocent man" to death can be a factor in the reconsideration of a capital case. Alford v. State, 307 So.2d 433,

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[illegible] 1970). The idea that the jury should likewise consider this [illegible] prevailing in the absence of [illegible] rights.

The appellant's death sentence must be set aside. This is so for the reasons the convictions of the capacity arose reversed is and the case law [illegible] supports it.

Respectfully submitted,

[redacted]

[redacted]
Assistant Public Defender
Second Judicial Circuit
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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been hand-delivered to Mr. Gypsy B. Bivalia, Jr., Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Appellee, and mailed to Mr. Robert D. Hanes, Esquire, Post Office Box 747, Starke, Florida 32091, on this [illegible] day of May, 1980.

[redacted]

RESPONDENT'S

BRIEF

ORIGINAL

NO. 83-6994

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Supreme Court, U.S.
FILED
JUL 19 1984
ALEXANDER L. STEVAS
CLERK

ROBERT D. HEINEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RECEIVED
JUL 19 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MEMORANDUM OPPOSING CERTIORARI

This case involves a challenge to a sentence of death imposed by the Circuit Court of Okaloosa County, Florida, which was affirmed by the Supreme Court of Florida on February 2, 1984, with rehearing denied on April 19, 1984. See Heiney v. State, 447 So.2d 210 (Fla. 1984). The petition presents two questions for review--(1) whether a sentence of death imposed by a trial judge after the jury has recommended life imprisonment offends the Constitution, and (2) whether the sentence of death was properly imposed under the facts of Petitioner's case. Petitioner recognized at the time his petition was filed that his case presented the precise issues before the Court in Spaziano v. Florida, Case No. 83-5596, and Petitioner asked that his case be reviewed in conjunction with Spaziano or in the alternative that his case be stayed until Spaziano was decided. Spaziano has now been decided, and it is apparent that the Court's opinion conclusively resolves Petitioner's claims. See Spaziano v. Florida, ___ U.S. ___, 35 Cr.L. 3199 (1984). Specifically, the Court rejected the constitutional challenge to Florida's death penalty law, and the Court also stated that it would not second-guess the Florida Supreme Court's determination that a death sentence was properly imposed under state law.

Therefore, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

LAWRENCE A. KADEN
Assistant Attorney General

The Capitol
Tallahassee, Florida 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Steven L. Bolotin, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 17th day of July, 1984.

LAWRENCE A. KADEN

OF COUNSEL

REPLY BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
AUG 20 1984
ALEXANDER L. STEVAS
CLERK

RECEIVED
AUG 20 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 83-6994

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ROBERT D. HEINEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF ON

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

(MEMBER OF THE BAR OF THIS COURT)

QUESTIONS PRESENTED

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QUESTION I

TO THE EXTENT THAT IT AUTHORIZES THE TRIAL JUDGE TO OVERRIDE A JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSE A DEATH SENTENCE IN ITS STEAD, FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT CONTAINED IN THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION. 1

QUESTION II

UNDER THE CIRCUMSTANCES OF THIS CASE, WHERE THE JURY'S LIFE RECOMMENDATION WAS APPARENTLY BASED ON THEIR BELIEF THAT THE EVIDENCE DID NOT CONCLUSIVELY FORECLOSE THE POSSIBILITY OF INNOCENCE, THE IMPOSITION OF A DEATH SENTENCE NOTWITHSTANDING THE JURY'S RECOMMENDATION VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. 1

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REASONS FOR GRANTING WRIT
(QUESTIONS I AND II)

The state has taken the position that Spaziano v. Florida, __U.S.__ (1984) (35 Cr.L. 3199) has resolved both issues raised in this petition for certiorari adversely to petitioner. Petitioner reluctantly concedes that this Court in Spaziano apparently rejected the arguments pertaining to the constitutionality of the provision in Florida's death penalty statute which authorizes the trial court to override the jury's life recommendation and to impose a death sentence in its place. Petitioner urges this Court to reconsider its decision in Spaziano, and would emphasize that (in contrast to the position apparently taken by Spaziano's counsel at oral argument in that case) petitioner's "fundamental premise" is not that jury sentencing is constitutionally required in all capital cases. Rather, petitioner's basic premise is in the nature of a Godfrey v. Georgia[1] argument; that the Florida Supreme Court has adopted such a broad and vague standard of review in "life override" cases as to violate the Eighth and Fourteenth Amendments. Further, petitioner submits that the override option was originally intended as a protection against arbitrary or unreasonable death recommendations by inflamed juries, and was approved by this Court in Proffitt v. Florida and Dobbert v. Florida[2] based on that assumption; while in practice the override procedure has been routinely used to impose the death sentence, notwithstanding the fact that six to twelve members of a death-qualified jury reasonably concluded that life imprisonment was the appropriate penalty.

In any event, the second issue raised in this petition for certiorari was clearly not resolved or even addressed in Spaziano. The question of whether residual doubt as to guilt, or the relative weakness of the circumstantial evidence of guilt, may properly be considered as mitigating factor in determining penalty [see Model Penal Code §201.6; Smith v. Balkcom, 660 F.2d 573, 580-81 (5th Cir. 1981)], is one which must be

1 Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

2 Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

decided with reference to the principles set forth in Lockett v. Ohio and Eddings v. Oklahoma[3], i.e. that the sentencer may not, as a matter of law, refuse to consider, or be precluded from considering, any relevant mitigating factor. The only impact which Spaziano has on this issue is that it makes it clear that (in this Court's view of Florida's dapital sentencing procedure) the judge, and not the jury, is the sentencer. In the instant case, the trial court expressed the opinion that the jury's recommendation of life imprisonment may have been based on the absence of direct testimony pertaining to petitioner's guilt, and he proceeded to conclude, as a matter of law, that this was not a relevant factor to be considered in mitigation, as it would be unfair to defendants who confess. Petitioner reasserts that the trial court's refusal to consider this factor in mitigation (and his actually turning it against petitioner by offering it as his affirmative reason for overriding the life recommendation) violated the Eighth and Fourteenth Amendments for the reasons discussed in Lockett and Eddings.

WHEREFORE, the petition for certiorari should be granted.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Steven L. Bolotin

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Post Office Box 671
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ATTORNEY FOR PETITIONER
(MEMBER OF THE BAR OF THIS COURT)

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[3] Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 47 L.Ed.2d 973 (1977); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, Northeast, Washington, DC 20543; Mr. Robert D. Heiney, #067877, Florida State Prison, Post Office Box 747, Starke, Florida 32091; and by hand delivery to the Honorable Sid White, Clerk of the Supreme Court, State of Florida, Tallahassee, Florida 32301 and to Lawrence A. Kaden, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 on this 14th day of August, 1984.

Steven L. Bolotin
STEVEN L. BOLOTIN

OPINION

SUPREME COURT OF THE UNITED STATES

ROBERT D. HEINEY v. FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 83-6994. Decided October 15, 1984

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from the denial of certiorari.

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. *See Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). I therefore dissent from the Court's denial of the petition to vacate the death sentence here.

I

I must also write, however, to point out an aspect of the trial judge's sentencing decision that violates indispensible principles contained in the prevailing death penalty jurisprudence of this Court. The trial judge in this case overturned a jury recommendation of life and sentenced the defendant to die, in part out of a belief as to the law that is wholly inconsistent with the constitutional principles of *Eddings* v. *Oklahoma*, 455 U. S. 586 (1982) and *Lockett* v. *Ohio*, 438 U. S. 586 (1978).

In reviewing the jury recommendation against death, the sentencing judge explained that he saw no mitigating circumstances, and that he believed the jury had based its recommendation on an "invalid" mitigating circumstance stemming from residual feelings of doubt as to guilt. Because he saw this as a legally improper mitigating circumstance he felt little hesitancy in putting their recommendation to the side.

Since the sentencing here, the Florida Supreme Court seems to have added its voice in support of the proposition that lingering doubts as to guilt can not be a ground for mitigating a death sentence.

> A convicted defendant cannot be "a little bit guilty." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

Buford v. *State*, 403 So. 2d 943, 953 (Fla.), cert. denied, 454 U. S. 1164 (1981). The error of the sentencing judge in this case thus seems to have been enshrined in Florida law.

This Court, in *Lockett* and then more decisively in *Eddings*, held that *any* aspect of the case that could rationally support mitigation must be deemed a legally valid basis for mitigation. There is certainly nothing irrational—indeed, there is nothing novel—about the idea of mitigating a death sentence because of lingering doubts as to guilt. It has often been noted that one of the most fearful aspects of the death penalty is its finality. There is simply no possibility of correcting a mistake. The horror of sending an innocent defendant to death, is thus qualitatively different from the horror of falsely imprisoning that defendant. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquital, is a feeling that stems from common sense and fundamental notions of justice. As such it has been raised as a valid basis for mitigation by a variety of authorities.

The wisdom behind mitigating death sentences in the face of doubts as to guilt led the drafters of the Model Penal Code to include that factor in their model death penalty statute as a mitigating factor so strong that its presence would exclude the possibility of death as a matter of law.

> *Death Sentence Excluded.* When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree [i. e., a non-capital offense] if it is satisfied that:
>
> . . . . .
>
> (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

A.L.I., Model Penal Code § 210.6(1), p. 107 (Off. Draft, 1980). In its explanatory comments the authors made their intentions clear:

> This provision is an accommodation to the irrevocability of the capital sanction. Where doubt of guilt remains the opportunity to reverse a conviction on the basis of new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal.

A.L.I., Model Penal Code § 210.6(1), comment 5, p. 134 (Rev. Comments 1980).

The Fifth Circuit has also acknowledged the validity of the mitigating factor:

> The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained *any* doubt whatsoever. There may be no *reasonable* doubt—doubt based upon reason—and yet some *genuine* doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt—this absence of absolute certainty—can be real.
>
> The capital defendant whose guilt seems abundantly demonstrated may be neither obstructing justice nor engaged in an exercise in futility when his counsel mounts a vigorous defense on the merits. It may be proffered in the slight hope of unanticipated success; it might seek to persuade one or more to prevent unanimity for conviction; it is more likely to produce only whimsical doubt.

> Even the latter serves the defendant, for the juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremedial penalty of death.

Smith v. *Balkcom*, 660 F. 2d 573, 580–581 (CA5 1981).

Once again, the factor was presented as a valid one in JUSTICE STEVENS' dissent in *Spaziano* v. *Florida*, —— U. S. ——, —— (1984). The dissent noted that the *Spaziano* jury "may well [have been] sufficiently convinced of [Spaziano's] guilt to convict him, but nevertheless also sufficiently troubled by the possibility that an irrevocable mistake might be made . . . that [it] concluded that a sentence of death could not be morally justified in this case." *Id.*, at ——, n. 34. We did not then realize, however, that Florida seems to have denigrated this wholly proper mitigating factor as a matter of law.

Standing in sharp contradistinction to the *Eddings* and *Lockett* holdings, the refusal by Florida courts to consider this valid factor should be reviewed.

II

Although this legal issue might arise in a sentencing scheme that respected the finality of a jury decision against death, it is not necessarily an accident that this case came from Florida's system, where judges may override jury decisions for life. In *Spaziano*, which upheld the Florida system, the dissent cited data showing that judges are usually more likely to impose death than are juries. *Ibid.* Where fully informed and rational juries decide that death is inappropriate, a judge's override rarely if ever shows that, in spite of the jury, there was really no reasonable doubt but that death was appropriate. It is far more likely that the override decision simply fails to account for the more intangible or less traditionally "legal" elements of mitigation that informed a jury's decision. This case seems a clear illustration. Indeed, the *Spaziano* dissent correctly suspected that

a system of death sentencing by judges—"trained to distinguish proof of guilt from questions concerning sentencing"—would be less likely to recognize this valid mitigating circumstance. *Ibid.*

Eddings and *Lockett* entitle a defendant to a sentencer who can consider *all* mitigating circumstances, whether or not they conform to traditional legal categories. The weight assigned to any element can only be a function of the values of the community, for certainly there is no "objective" formula. Once a mitigating circumstance is considered, assigned weight, and determined to be sufficient to preclude death, the Constitution should allow no "superior" authority to remove that circumstance from the equation and impose death. To allow a judge to override a jury decision for life—as this Court did in *Spaziano*—not only places the defendant in the fundamentally unfair position of having to repetitively justify the appropriateness of one's continued life, it also facilitates the denigration of a variety of mitigating circumstances.

Only a narrow reliance on legal formalism could lead one to question whether doubts as to guilt can be insufficient to preclude acquital but sufficient to preclude death. The judge here concluded that the jury confronted the horror of sending to his death a defendant who might be innocent. But rather than accept that this was weighty logic in favor of life, he assumed that it was a form of logic that should be declared invalid by Florida courts. I dissent from the denial of the petition in this case.